

77989

MAR 20 '61

SOUND
.....

229

No.
Agenda Number 3.

$$\frac{2}{61}$$

3. A

328 I.A. 174

I.A. 174

APPEAL FROM THE CIRCUIT COURT
OF TAZEWELL COUNTY

[illegible]

~~HONORABLE JOSEPH E. DAILY,~~
~~Presiding Judge.~~

TY
2264

Plaintiff Neal D. Reardon, together with others, executed thirty mortgage bonds totaling \$30,000.00 secured by a trust deed on certain real estate in Tazewell County. The bonds and trust deed were dated March 1, 1927 and were due five years after date. It also appears from the record that the bonds were paid at various times, the last payment being on December 5, 1936, over four years after maturity. Reardon filed a claim against the estate of W. P. Herget, the trustee, who is now deceased, in the Trust Deed. This claim recites it was for money had and received from September 30, 1936 in the sum of \$1102.50. Defendant, executor of the Herget estate, objected to the claim and a hearing was had before the County Court of Tazewell County which disallowed the claim. On appeal to the Circuit Court of Tazewell County, the Court on defendant's motion, directed the jury to find for defendant.

Agenda No. 12.

OF ILLINOIS

THIRD DISTRICT 329 I.A. 174

MAY TERM, A. D. 1946.

APPEAL FROM THE CIRCUIT COURT

OF MACON COUNTY.

vs.

Defendant and Counter-
Claimant-Appellant.

HAYES, P.J.:

The plaintiff Winnie I. Greene filed a complaint for separate maintenance based on desertion. The defendant Arthur A. Greene filed an answer and counterclaim, the counterclaim asking a decree of divorce on the grounds of desertion. The separation occurred on January 22, 1944. The couple lived in the rural district. The plaintiff left the home one day stating she was going to town and would be back the next night. She did not return.

Plaintiff filed her suit February 28, 1944.
Defendant filed his amended counterclaim July 3, 1945.
On October 15, 1945 the Court entered an order dismissing the complaint and the amended counterclaim holding; that the plaintiff had failed to prove her complaint by a preponderance of the evidence; that the defendant was not entitled to a decree on the grounds of desertion for a period of one year for the reason that during a portion of the year immed-

1051150

488.1.1.1.1

Digitized by the Internet Archive

in 2011 with funding from

CARLI: Consortium of Academic and Research Libraries in Illinois

2.

ately prior to the filing of defendant's counterclaim plaintiff's complaint was pending and that said complaint had been filed in good faith.

Defendant contends that the running of the period of desertion was not tolled by the pendency of plaintiff's suit because plaintiff's complaint was not filed in good faith. The evidence shows that the separation was plaintiff's fault rather than defendant's. From an examination of the evidence it appears that plaintiff was not warranted in leaving her home and that the chancellor properly dismissed plaintiff's complaint for want of equity in that plaintiff had failed to prove her case by a preponderance of evidence. Plaintiff fails to prosecute her suit in this court. She does not file an appearance nor briefs herein. Although the law of this state is strongly in favor of maintaining the integrity and permanency of the marriage relation it does not look with favor on a woman leaving her home without cause, and living separate and apart from her husband and collecting alimony from him for her support and maintenance.

Under this record as it now stands Mrs. Greene has failed to prove her case in the Court below and has neglected to appear here in this Court. She persists in living separate and apart from her husband. We cannot hold that she has shown such good faith as to toll the one year period provided by law. We therefore affirm that part of the decree of the Circuit Court of Macon County which dismissed the complaint of Mrs. Greene, and reverse that part of the decree in said court which dismissed the counterclaim of defendant and remand it with directions to said court to hear the counterclaim on its merits, and to take into consideration the present status of the parties as well as provide for the custody and support of the minor

is left open to the filling of the President's commission.

The President's commission was granted and that act is considered as
has been filed in court.

Unlawful contracts that the President of the United States

of the President was not valid in the President of the United States

and because of the President's commission was not filed in court.

Under the President's commission that the President of the United States

is left open to the filling of the President's commission.

The President's commission was granted and that act is considered as

has been filed in court.

Unlawful contracts that the President of the United States

of the President was not valid in the President of the United States

and because of the President's commission was not filed in court.

Under the President's commission that the President of the United States

is left open to the filling of the President's commission.

The President's commission was granted and that act is considered as

has been filed in court.

Unlawful contracts that the President of the United States

of the President was not valid in the President of the United States

and because of the President's commission was not filed in court.

Under the President's commission that the President of the United States

is left open to the filling of the President's commission.

The President's commission was granted and that act is considered as

has been filed in court.

Unlawful contracts that the President of the United States

of the President was not valid in the President of the United States

and because of the President's commission was not filed in court.

Under the President's commission that the President of the United States

is left open to the filling of the President's commission.

The President's commission was granted and that act is considered as

has been filed in court.

Unlawful contracts that the President of the United States

of the President was not valid in the President of the United States

and because of the President's commission was not filed in court.

3.

child. The final decree is to be governed by the existing circumstances and equities between the parties at the time of the hearing.

Affirmed in part, reversed in part and remanded with directions.

which, after being so long in the hands of the
authorities, and having been the subject of so many
of the reports.

It is to be hoped, however, that the

will be found

Abstract

STATE OF ILLINOIS
APPELLATE COURT
May Term, A. D. 1946

4
2283

Gen. No. 9502

Agenda No. 11

People of the State of Illinois on)
the Relation of Henry Dickwisch,)
Plaintiff-Plaintiff in Error,)
-vs-)
Virginia Ruffcorn, Norma Ruffcorn,)
Kenneth Ruffcorn, Chester Ruffcorn,)
Jr., Carroll Ruffcorn, Melva Sue)
Ruffcorn, Donna Lee Ruffcorn,)
Sandra Kay Ruffcorn, Chester Ruff-)
corn, and Myrl Ruffcorn,)
Defendants-Defendants in)
Error.)

Civil Action at Law
Statutory Proceeding
Concerning Alleged
Dependent and Neg-
lected Children.

329 I.A. 175

Dady, J.

The People of the State on the relation of the plaintiff, Henry Dickwisch, filed a verified petition in the County Court of Hancock County against the defendants, Chester and Myrl Ruffcorn, and eight of their children under eighteen years of age, charging that the children were dependent and neglected. A jury trial resulted in a verdict finding the issues in favor of the defendants. Judgment was rendered on the verdict finding the minor defendants not dependent and neglected children. Plaintiff prosecutes this writ of error.

The first and principal contention of plaintiff is that the verdict was contrary to the manifest weight of the evidence.

Under our rules we could reverse pro forma the judgment of the trial court because of the failure of the respondents to file any reply brief. However, a reading of the record indicates

STATE OF ILLINOIS
Circuit Court
May Term, A. D. 1945

James M. 11

James M. 11

People of the State of Illinois vs.
the Defendant Harry Dickson,

Plaintiff-Defendant in Error,

-vs-

Alvin Karpis, James Campbell,
Bernard Goetz, Chester Williams,
J. J. Campbell, James Lee,
Eugene J. James, James Lee,
Charles Lee, James Lee,
James Lee, James Lee,
James Lee, James Lee,

Defendants-Defendants in
Error.

Civil Action of Law
Statute for setting
aside verdicts in
Criminal Cases
Defendant and
James M. 11

322 I.A. 115

The People of the State on the relation of the Plaintiff,
Harry Dickson, filed a verified petition in the County Court of
Hancock County against the Defendants, Goetz and J. J. Campbell,
and also of their children under sixteen years of age, charging
that the children were kidnapped and molested. A jury trial
resulted in a verdict finding the James in favor of the Defendants.
The James was returned on the verdict finding the minor Defendants
not innocent and molested children. Plaintiff proposed this
bill of error.

The first and principal contention of Plaintiff is that
the verdict was contrary to the manifest weight of the evidence.
Under our rules as usual reversal has been the result
of the trial court because of the failure of the prosecution to
give any real proof. However, a reversal of the verdict requires

that the finances of the respondents' parents may not have permitted them to file such brief. Because of this, and because of the importance of the principal questions involved, that is the welfare of the children and the rights of the parents, we deem it proper to decide the case on its merits. We have not only carefully read the brief and abstract filed by plaintiff, but have also carefully read the report of the trial proceedings.

The evidence is quite voluminous. Fifteen witnesses testified for the plaintiff and eight for the defendants. We do not consider that a detailed discussion or analysis of such evidence is necessary or useful.

The parents have twelve children. The four older children, three sons and a daughter, were away in the military service at the time of the trial. The eight children involved are five girls aged respectively about 17, 16, 4, 3 and 1-1/2 years, and three boys aged respectively about 13, 11 and 7 years. The 17 year old girl is a junior in high school. The 16 year old girl went through the first year of high school. At the time of the trial she was doing house work for a farmer and his wife, but spent the week ends with her parents. She testified that she quit school to stay at home and help. The three boys were attending school. All of the ^{eight} children, except the 16 year old girl lived with the parents.

From November 17, 1944, to the time of the trial the family lived in the "upstairs of an old frame building," in two rooms, each about 16x16 feet. One room was used as a bedroom and the other as a kitchen and dining room. There was no running water and no inside toilet. The father is a laborer aged fifty years, who made \$37.00 a week on regular pay, and \$45.00 a week when he worked over-time. As to

that the fitness of the respondents' parents may not have been certified
then to this much earlier. According to this, and because of the
importance of the criminal questions involved, that in the return
of the children and the return of the parents, to whom it appears to
belong the case on the merits. It has not only carefully read the
brief and answer filed by plaintiff, but have also carefully read
the report of the trial proceedings.

The witness is quite voluminous. It seems witness testified for
the plaintiff and also for the defendant. He is not certain that
a detailed statement or analysis of each witness is necessary or
useful.

The parents have five children. The four older children, three
sons and a daughter, were born in the following order: the oldest
the female. The eight children together are five girls and respectively
about 14, 12, 10 and 8 years, and three boys were respectively
about 12, 11 and 9 years. The 12 year old girl is a junior in high
school. The 10 year old girl went through the first year of high
school. At the time of the trial she was doing house work for a farmer
and his wife, but spent the week with her parents. She testified
that she did not assist in any way and help. The three boys were
attending school. All of the children, except the 12 year old girl
lived with the parents.

From November 17, 1944, to the time of the trial the family lived
in the "apartment at an old frame building" in the 1-10th, each about
12x12 ft. The room was used as a bedroom and the other as a kitchen
and dining room. There was no outside water and no inside toilet.
The father is a laborer and fifty years, was born 1874, is a white
on record 1940, and \$2.00 a week when he worked occasionally. He to

the adequacy of the living quarters under such circumstances, we consider it sufficient to say that the brief of petitioner states: "The home is kept clean most of the time. Chester Ruffcorn, the father, has made an attempt to find a larger place without success, and would gladly move if he could find a place. * * * Since November 17, 1944, Chester said he had tried more than four or five places but everything was full."

The brief of the plaintiff states, "The children involved in this suit are nice, well-mannered, lovely children. Their parents have provided them with food and clothing." They "are clean and dressed according to their station in life. Mrs. Ruffcorn took care of these children from birth without hired help."

The principal contention of the plaintiff appears to be that the father drinks too much, and that the mother has been immoral. As to the father, such brief says, "He has worked nearly every working day" cleaning vats and tanks in a brewery, he is a "peaceable person and he is agreeable and agrees too easily. He lets people run over him." Several people testified that they saw the father intoxicated, or partially intoxicated, on various occasions. Other witnesses testified to the contrary. His employer testified that the father had worked for him practically every day since 1938.

As to the alleged immorality of the mother, the evidence does tend to prove that at different times she apparently had been too friendly with a widower who lived in the same town but some distance removed from the home of the parents. However, such conduct did not take place in the Ruffcorn home or in the presence of any of the children other than the two small babies.

While the habits of the father with reference to the use of intoxicating liquor, and such conduct of the mother, should be sternly disapproved of,- after a careful consideration of all the evidence, we feel that we cannot say that the verdict was contrary to the manifest weight of the evidence.

The only other complaint is that the court erred in the giving of certain instructions asked by the defendants. The instructions, particularly those given at the request of the plaintiff, were voluminous, and as a whole fully and fairly instructed the jury as to the applicable law.

It is our opinion that there was no reversible error in the giving of instructions.

It is our opinion that a fair trial was had before an apparently impartial jury. The trial judge also saw and heard the witnesses, and he approved of the verdict by denying the motion for a new trial and entering judgment on the verdict.

The judgment of the trial court is affirmed.

Affirmed.

While the habits of the people will reference to the use of
interesting figures, and such accounts of the women, should be
sternly disapproved of, - after a careful consideration of all the
evidence, we feel that we cannot say that the verdict was contrary
to the manifest weight of the evidence.

The only other complaint is that the court erred in the giving
of certain instructions asked by the defendant. The instructions,
particularly those given at the request of the plaintiff, were
voluntary, and at a whole fair and fairly instructed the jury
as to the applicable law.

It is our opinion that there was no reversible error in the
giving of instructions.

It is our opinion that a fair trial was had before an impartial
jury. The trial judge also saw and heard the witnesses,
and he approved of the verdict by finding the motion for a new trial
and setting aside judgment in the verdict.

The judgment of the trial court is affirmed.

AFFIRMED.

stract

STATE OF ILLINOIS
APPELLATE COURT
MAY TERM, A.D. 1946

Gen. No. 9482

Agenda No. 1

Margaret Cole,
Plaintiff-and Appellant,)
vs.)
Carl I. Glasgow, E. J. Hawbaker)
and F. L. Barton, Trustee,)
Defendants-and Appellees.)

Appeal from the
Circuit Court of
Piatt County,
Illinois.

329 I.A. 176¹

Wheat, J.

The appellant, Margaret Cole, hereinafter called plaintiff, filed her suit in equity against the appellee, E. J. Hawbaker, hereinafter called defendant, in the first count of which complaint, she requested the cancellation of a certain note and trust deed, offering to do equity in the premises and to pay such amount as the Court should direct; the second count, among other things, asked for cancellation of a deed. The defendant filed his answer and accepted the plaintiff's offer of payment contained in the first count. Subsequently, defendant moved the Court to determine the amount due him, which was done, the Court ordering plaintiff to pay the defendant the amount found due, \$400, within forty-five days, and, in the alternative, that her suit be dismissed. Upon failure to comply with such order and make payment, the complaint was dismissed. Other parties were made defendants on different issues not relevant to this appeal, and the complaint still stands as to them.

A

REPORT OF THE

COMMISSIONER OF THE

LAND OFFICE

OF THE

STATE OF

TO THE

LAND OFFICE

1880

1880

The following is a list of the lands owned by the State of California, as of the 1st day of January, 1880. The lands are listed in alphabetical order, and are divided into two classes, viz: (1) Lands owned by the State of California, and (2) Lands owned by the United States Government. The lands are listed in the following order: (1) Lands owned by the State of California, and (2) Lands owned by the United States Government. The lands are listed in the following order: (1) Lands owned by the State of California, and (2) Lands owned by the United States Government.

A brief statement of facts is unusually difficult, as the complaint is extremely verbose and the litigation has extended over a considerable period of time. As plaintiff says in her brief, "To give a statement of the facts properly in this case is nigh an impossible task." Inasmuch as the plaintiff relies upon one ground only, for reversal, this statement will be limited to the matters relevant to such assignment of error.

On February 5, 1943, the complaint was filed, the first count of which charges that judgment by confession was entered against her on January 7, 1939, for \$4013.96, in favor of the First National Bank of Bement, Illinois; that the judgment was opened up and she was given leave to plead; that in connection with the settlement of such judgment, on January 25, 1939, she executed the note under discussion in this case in the principal sum of \$400, due one year after the death of her father, William S. Vrooman, (now still living), and bearing interest at the rate of six per cent per annum after such death; that said note was secured by her trust deed on a contingent fractional interest in certain real estate; that she received, at such time, the sum of \$250 in cash; that said note and trust deed, on January 3, 1940, were assigned by the State Bank of Bement to the defendant, E. J. Hawbaker, for the alleged consideration of \$350, and that such note is now owned and possessed by such defendant; that such note and trust deed are conditionally voidable. Plaintiff states that, if, upon hearing, the Court holds such trust deed and note secured thereby to be voidable, she will comply with the Court's order in regard to the payment of such amount as the Court may hold to be legally or equitably due to the owner and holder of such indebtedness. Count II repeats, by reference, all of the matters alleged in Count I,

1. The first statement is that the Commission is not a permanent body.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

The Commission is not a permanent body. It is a body of experts.

It is the Commission's duty to examine the situation and to report to the Council.

and, in addition thereto, asks for the cancellation of a certain deed to the defendant for which it is alleged she received, as consideration, the sum of \$150. Defendant's answer, as to Count I, accepted plaintiff's offer to do equity and says that he is the bona fide purchaser of the said note and trust deed, having purchased the same, January 3, 1940, for the sum of \$350, and that he is willing to surrender and cancel said note and deliver the same to the plaintiff and release the said trust deed, upon payment to him of the amount the Court should find due. This answer was filed June 29, 1944. Thereafter, on December 28, 1944, the defendant filed a motion, setting up the offer of the plaintiff to do equity and his acceptance of the same and asking that the Court, after ascertaining the amount due him, to order payment, and, in default thereof, to dismiss the complaint. The motion was later heard and evidence was taken indicating that the defendant was a bona fide purchaser of the note and trust deed. On February 27, 1945, an order was entered directing plaintiff to pay defendant the sum of \$350 plus interest, or, a total sum of \$400, within forty-five days from date, upon the payment of which, the defendant was ordered to cancel and surrender such note and release the trust deed, and, in the alternative, in the event the plaintiff failed to make such payment within the time limited, the complaint should stand dismissed for want of equity. Plaintiff's motion to set aside this order was denied March 17, 1945, and this appeal follows.

Only one point is urged in the plaintiff's statement of facts and argued in her brief and that is, in the language of the plaintiff, "This volume of material creates enough facts and circumstances that stagger me to begin with the task of giving

a brief and fair statement of the facts. I must frankly confess my total inability to do it, -- believing as I do that what really and only is materially involved in any and all claimed to be contested issues by this defendant E. J. Hawbaker, can be and are, as a matter of law and pleading, limited to this one simple, very simple, proposition of law, namely: Can a promissory note that is not due until one year after the death of a third person be advanced to maturity and by law have payment enforced, -- under any conditions in equity or law -- prior to the death of the third person, and where there are no conditions in the note to admit of a different maturity date? I say it cannot; the defendant urges that it can be. That is the case at bar." The following language appears in plaintiff's argument: "I re-state my position as I did at the outset of my statement, namely, that the only material issue in this whole case, as I view it, is and can only be: Will the law admit of an obligation to pay money to be altered or conditioned so as to make the maturity date to come sooner in point of time than it is fixed by the terms of the instrument itself?"

Although the assignment of errors, relied upon for reversal, paragraph 4 thereof, contains the following language: "The Court erred in holding that the plaintiff could not pursue her suit against the defendant, unless, and until, she paid the sum of \$350 and the interest thereon, or the said total of \$400, to the said defendant", it cannot be determined whether it is the intention of the plaintiff to urge that even though Count I of the complaint were dismissed, such action should not have been taken as to Count II. If this be the intention, the point cannot be considered, as the theory of the plaintiff in the Trial Court was based upon the single contention quoted above in her statement of

1. The first of these is the fact that the
2. second is the fact that the
3. third is the fact that the
4. fourth is the fact that the
5. fifth is the fact that the
6. sixth is the fact that the
7. seventh is the fact that the
8. eighth is the fact that the
9. ninth is the fact that the
10. tenth is the fact that the

facts and in her argument, to-wit: that the sole issue related to the payment of any amount prior to the maturity of the note. Points not raised in the Trial Court may not be urged, for the first time, on appeal. (^{Rockford}The People v. Silver Plate Co., 388 Ill. 534, 537). "The burden is upon the one assigning errors to direct the attention of the Court to the specific respects in which the decree is erroneous. We are under no obligation to search the record for errors which might have been committed * * * ." (Verble v. Dillow, 218 Ill. 537, 539). Where an appellant's brief states that he has eliminated from the argument practically all other points except a certain point, it amounts to abandonment of all other grounds. (Merritt v. Crane Co., 225 Ill. 181, 188). Argument of only one assignment of error waives all others. (Schmidt v. Schmidt, 277 Ill. 191). By reason of the above authorities, and many others, we conclude that the only question to be considered by the Court relates to the propriety of the Trial Judge in ordering the payment of the sum of \$350 and interest, prior to the due date of the note, which is one year after the death of William S. Vrooman, who is now living. In this connection, it is not urged that the Trial Court was in error in ordering the complaint dismissed if the amount was not paid, but only that he had no legal right to order such payment prior to the time of the maturity of the note. Plaintiff has misapprehended the principle upon which such sum was directed to be paid. This amount was not to be paid as evidencing a debt secured by a note and trust deed, but, rather, was an attempt by the Court to put the parties in status quo so that the defendant would be paid the sum of \$350, which represented his expenditure. If the Court had proceeded on plaintiff's theory of payment, the amount ordered paid would have been the face of the note, \$400, rather than the sum of \$350,

The first of these is the fact that the
 Government has been unable to secure
 the necessary funds to carry out its
 policy of non-interference. This is
 due to the fact that the Government
 has been unable to secure the necessary
 funds to carry out its policy of non-
 interference. This is due to the fact
 that the Government has been unable
 to secure the necessary funds to carry
 out its policy of non-interference.

the purchase price. It is a mere coincidence that the sum of \$350 with interest approximates the principal of the note, but such would not have been the case had defendant purchased the note for, let us say, \$100, in which event, the order would have provided for the re-payment of the sum of \$100 and interest. This being true, the Trial Court did not err in view of the state of the pleadings, i.e., the offer to do equity by the plaintiff and the acceptance by the defendant of such offer in ordering such payment, or, in the alternative, the dismissal of the complaint. Plaintiff has cited only two cases in her brief, one of which is Mayer v. Pick, 192 Ill. 561, the issue in which case is totally foreign to the one under consideration, as it related to the vacation of a judgment confessed in violation of the power of attorney accompanying the note. The other case is that of Waternach v. Studt, 240 Ill. 464, which related to a proceeding to set aside a deed as a result of an administrator's sale of real estate and has no application to the point now being discussed.

We believe the Circuit Court was not in error in entering the order dismissing the complaint in the event the payment therein ordered was not made.

Appellant's brief and argument contains language relating to the Trial Judge and the Circuit Court which can, at best, only be termed as intemperate, ill-advised and inexcusable. This practice adds nothing to an argument and almost merits the striking of the entire brief. It is expected that no similar comments will ever again appear in a case presented to this Court.

The order of the Circuit Court, dismissing the complaint, is affirmed.

Affirmed.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637

1. The first of these is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the rights in the patent for the atomic bomb. This decision is of great importance, for it will determine whether the United States will be able to develop the atomic bomb for itself, or whether it will have to rely on the United States for the development of the atomic bomb.

STATE OF ILLINOIS
APPELLATE COURT
MAY TERM, A.D. 1946

Gen. No. 9497

Agenda No. 7

Vera Price (Mabel Hubbard,
Intervening Petitioner),
Plaintiff-and Appellee,
vs.
Lyndell Price,
Defendant-and Appellant.)

Appeal from the
Circuit Court of
Greene County.

Wheat, J.

329 I.A. 176²

This is an appeal from an order of the Circuit Court of Greene County, granting the custody of a minor child to her maternal grandmother, Mabel Hubbard, intervening petitioner, and denying such custody to the father of the child, Lyndell Price, the petitioner, who now appeals.

It appears that Lyndell Price and his wife, Vera, were married on November 9, 1937, at which time, the former was of the age of sixteen years and the latter was of the age of eighteen years. The child in question, Janet Darlene Price, was born the following year. Following the marriage, the couple lived a brief time in the home of the parents of appellant and then went to live with the parents of the wife. In March, 1938, appellant returned to the home of his parents, after which time, the couple never again lived together as husband and wife. The child's mother, Vera Price, obtained a divorce from her husband, Lyndell, September 2, 1941, on the charge of desertion, the decree awarding the child's

1087

182

[illegible]

custody to the wife, who died May 24, 1945. In June, 1945, the father filed his petition for custody of his daughter, and the maternal grandmother, Mabel Hubbard, filed her intervening petition, likewise requesting such custody, the latter relief being granted by the Circuit Court.

The record indicates that neither the appellant nor his parents evidenced any sincere interest in the welfare of such child during the seven years since her birth. Neither contributed any part of the expense attending her birth, and the father first saw the child some two months later. When the daughter, later, was ill with pneumonia for several weeks, neither visited her, made any inquiries concerning her, nor paid any part of the medical expense. Neither the father nor his parents have ever contributed any amount, nor done any act, toward the support, education and welfare of the child, except that while the appellant was in the Armed Forces, and, as he admits, "after he was pushed", through the intervention of the Red Cross, an allotment was made. These payments have been saved by Mabel Hubbard toward a college fund for her granddaughter. The child and her father are scarcely acquainted and she is an entire stranger to her paternal grandparents, in whose custody she would be until such time as appellant were discharged from the Army (if the relief sought by his petition were granted). During the seven years since her birth, the child has, at all times, lived in the home of her grandmother, Mabel Hubbard, and a strong bond of affection has naturally grown between them.

Insofar as the fitness of the parties is concerned, or their financial ability to properly maintain and support the child, there seems to be no question that the grandmother, Mabel Hubbard, is a fit and proper person and properly circumstanced

1. The first of these is the fact that the
the system which the government has chosen
and the system of government which the
government has chosen to adopt. The system
of government which the government has chosen
to adopt is the system of government which
the government has chosen to adopt.

[illegible][illegible]

to provide an adequate home and proper support for such child, and, likewise, this seems to be true of the paternal grandparents. As to the father of the child, it does not appear that he has any bad habits and the only fault to find with his conduct has been his complete lack of interest in the welfare of such child during the entire seven year period.

Chapter 3, Para. 284, Illinois Revised Statutes 1945, provides that "When both parents of a minor ~~child~~ are living and are competent to transact their own business and are fit persons, they are entitled to the custody of the person of the minor and the direction of his education; and, if one parent is dead and the surviving parent is competent to transact his own business and is a fit person, he is similarly entitled." A parent has the right to the custody of his child as against the world unless he has forfeited his right or the welfare of the child demands that he should be deprived of it. (Sullivan v. ex rel. Heeney, The People, 224 Ill. 468, 475). The right of such parent is not an absolute one but may be forfeited. (Stafford v. Stafford, ex rel. Kuhn, 299 Ill. 438, 449; The People v. Weeks, 228 Ill. App. 262, 263). It requires no discussion of the many other authorities on the subject to state that the fundamental principle in a controversy over the custody of a child is that the welfare of the child is the predominant factor and should be given controlling consideration.

The appellant, during the seven years since the child's birth, has never assumed the responsibilities of a father and his attitude toward his child, during all of such time, has been one of complete indifference and neglect. Although not unfit morally, in the usual sense, he has disclosed such a lack of fatherly characteristics as to indicate a forfeiture of the right to have the child's custody, at the present time. The welfare of the

[illegible]

daughter would best be served, at least for the present, by having her continue in the custody of Mabel Hubbard, enjoying, as she is, a satisfactory home life accompanied by mutual love and affection. This Court concurs in the well stated opinion of the learned Trial Judge, as to the law and facts in this case, and believes the appellant, at least for the present, has forfeited his natural right to the custody of his daughter, and that her welfare will best be served by awarding such custody to the intervening petitioner, Mabel Hubbard. The father should be permitted the right of reasonable visitation, as decreed by the Trial Court, to enable him, if he so desires, to nourish the natural love, affection and understanding which should exist between parent and child, to the end that at some future date, changed conditions may warrant a different conclusion than here reached.

The judgment of the Circuit Court is affirmed.

Affirmed.

[illegible]

Abstract

329 I.A. 177¹

STATE OF ILLINOIS
APPELLATE COURT
MAY TERM, A.D. 1946

Gen. No. 9501

Agenda No. 10

Charles Gilmore,
Plaintiff-and Appellee,

vs.

Charles Mix, W. A. Doss
and T. W. Doss,
Defendants-and Appellants.)

Appeal from the
Circuit Court of
McLean County,
Illinois

2313

Wheat, J.

On April 25, 1945, judgment by confession in the sum of \$1240.85 was entered in the Circuit Court of McLean County in favor of the appellee, Charles Gilmore, hereinafter called plaintiff, and against the appellants, Charles Mix, W. A. Doss and T. W. Doss, hereinafter called defendants. On June 26, 1945, motions to vacate the judgment and for leave to plead were filed by defendants, which motions were denied, and from this ruling, defendants appeal.

Because the plaintiff and the defendants have entirely different versions of the factual situation, it is necessary to set forth, briefly, both the allegations set forth in the complaint and in the motions to vacate. The complaint alleges that on February 12, 1944, the plaintiff entered into an agreement with the defendant, Charles Mix, for the sale by plaintiff to Mix of a Studebaker truck, plaintiff's oil business and miscellaneous

RECEIVED

8321A177

STATE OF ILLINOIS
COURT OF COMMON PLEAS
JAN 19 1963

Amended No. 10

Jan. 19, 1963

Shirley Ann Glimore
vs.
State of Illinois
County of Cook
Illinois

Charles Glimore
Plaintiff and Defendant
vs.
Shirley Ann Glimore
Defendant and Plaintiff

Amended

On April 10, 1962, judgment by confession in
the sum of \$100.00 was entered in the County Court of
Cook County in favor of the plaintiff, Charles Glimore,
and against the defendant, Shirley Ann Glimore, and
against the plaintiff, Shirley Ann Glimore, and against
the defendant, Charles Glimore. On June 10, 1963, motions to
vacate and for leave to file a bill of complaint were filed
by defendant, Shirley Ann Glimore, and from this filing, defendant
Shirley Ann Glimore was denied, and from this ruling, defendant
Shirley Ann Glimore appealed.

Because the plaintiff and the defendant have
entirely different versions of the factual situation, it
is necessary to set forth, briefly, both the allegations
set forth in the complaint and in the motion to vacate.
The complaint alleges that on February 10, 1962, the
plaintiff entered into an agreement with the defendant,
Charles Glimore, for the sale of plaintiff's car to the
defendant, Charles Glimore, for the sum of \$100.00 and miscellaneous

items for the total sum of \$2000; that the sale price for the truck was to be \$400; that the sale price for the pumps and miscellaneous items was to be \$600; that the sale price for the gas route was to be \$1000; that it was agreed that \$1000 was to be paid by cash and the remainder by note in the principal sum of \$1000, due January 1, 1945, which note was to be endorsed by the defendants, W. A. Doss and T. W. Doss; that without the knowledge or agreement of plaintiff at such time, it was written on the face of the note that it was given for part purchase price of said truck; that the cash payment of \$1000, representing the payment of \$400 for the truck and \$600 for the miscellaneous items, has been paid, but that no part of the principal or interest on the \$1000-note has been paid.

The defendant, Charles Mix, in his motion to vacate filed July 26, 1945, alleges that there was a sale of the gas business to him on February 12, 1944, but that the purchase price was \$2300, comprising the sale price of the Studebaker truck at \$1400, a motor pump and hose at the sale price of \$75, good-will at the price of \$525, oils and greases at the sale price of \$300; that \$1000 of the purchase price was to be represented by the promissory note in question; that it was expressly agreed by the plaintiff and the defendants that the note was to be a title retaining note upon said truck; that his first payments were to be upon such note in order to relieve the endorsers of their liability and that after said note had been paid, the said Mix was to pay in installments, out of

1. The first of these is the fact that the defendant, James Earl Ray, was a member of the Black Panther Party (BPP) at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

2. The second fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

3. The third fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

4. The fourth fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

5. The fifth fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

6. The sixth fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

7. The seventh fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

8. The eighth fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

9. The ninth fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

10. The tenth fact is that the defendant, James Earl Ray, was a member of the BPP at the time of the assassination of Dr. Martin Luther King Jr. on April 4, 1968. The BPP was a revolutionary socialist organization that advocated for the liberation of African Americans through armed struggle and the establishment of a new society based on the principles of Marxism-Leninism.

the operation of the business, from time to time, the balance of the purchase price; that on February 17, 1944, said Mix paid, by check, the sum of \$400 to plaintiff, on the face of which check was written the words "For Truck"; that on the same day, said Mix paid the plaintiff an additional sum of \$600, by check, on the face of which was also written the words "For Truck"; that on February 28, 1944, said Mix paid plaintiff the sum of \$50, by check, which was to apply upon the contract of purchase, the defendant being unable to recall whether the said \$50 was to be applied on the payment of the truck or not; that on March 2, 1944, said Mix paid the plaintiff, by check, the sum of \$300, and that while such check now bears on its face the words "For Truck", such words were placed thereon by Mix, for personal identification of the payment, after he had received the check upon clearance through the bank but that said check, in fact, was given to apply upon the payment for the truck; that by reason of the above payments, said Mix has paid the plaintiff an amount more than sufficient to pay the principal and interest on such note of \$1000.

The defendants, W. A. Doss and T. W. Doss, on June 26, 1945, in their motion to vacate such judgment, assert that they signed the same only in the capacity of endorsers and, therefore, judgment by confession could not lawfully have been entered against them.

Plaintiff filed no counter-affidavits nor motion to strike the verified motions to vacate. He now urges that defendants have not shown due diligence in filing

their motions, the judgment having been entered on April 25, 1945, and the motions having been filed on June 26, 1945. It does not appear from the record that any execution was ever issued or served, although the verified motion of the defendant, Charles Mix, recites that no execution was ever served upon him; that he first learned of the judgment on June 10, 1945, upon which date he made arrangements for the employment of the attorney (who, in fact, did later appear for him) to take whatever legal proceedings would be necessary to vacate such judgment; that such attorney, by reason of other urgent professional commitments, stated that he would proceed as soon as such other matters were disposed of. It does not appear that a delay of sixteen days, part of which time was used in the preparation of the motions to vacate, is such an unreasonable delay or shows such lack of diligence as to bar the right of defendants to have a hearing on the merits of such motions. In the case of Stranak v. Tomasovic, 309 Ill. App. 177, 181, it was said, "The general rule is that on motion to open a judgment entered by confession and for leave to defend, the question of a meritorious defense is of much more importance than the question of defendant's diligence or the lack of it."

It is next urged by plaintiff that the motions to vacate the judgment do not state a meritorious defense. In that connection, inasmuch as no counter-affidavits were filed by the plaintiff nor was there filed any motion to strike defendant Mix's verified motion, plaintiff thereby conceded, impliedly, that defendant's verified motion set up a meritorious defense. (Security Discount Corporation v.

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA, in the case of the People of the District of Columbia vs. John Edgar Hoover, has affirmed the judgment of the District Court of the District of Columbia, in the case of the People of the District of Columbia vs. John Edgar Hoover, No. 10,000, dated and docketed at Washington, D. C., on the 10th day of November, 1936.

Jackson, 320 Ill. App. 440). Likewise, where no counter-affidavits are filed, the Court must accept as true the material allegations in the verified motion to vacate. (Nudelman v. ^AHimowitz, 321 Ill. App. 306; Hogan v. Ermovick, 335 Ill. 181, 182). A consideration of the material allegations in the motion of the defendant, Charles Mix, as hereinbefore set forth, indicates that, if true, he has a meritorious defense to the whole of plaintiff's demand.

There is a further reason why such motion sets forth a good defense in that leave is requested for the filing of a counter-claim against the plaintiff for damages for false misrepresentations of material facts by way of inducing the defendant to enter into the oral agreement to purchase. It is alleged that the plaintiff represented that such business would average an annual business of at least 150,000 gallons of gasoline in sales, whereas the defendant subsequently learned that in the prior year, the plaintiff's business did not exceed 50,000 gallons; that during the year the defendant operated the business, his sales amounted to 50,000 gallons; that upon the sale of each gallon the defendant would have earned a gross profit of 2.8 cents per gallon, by reason of which he was damaged to the extent of \$1400 on account of said false and misleading statements; that in such counter-claim, the defendant desired to include a charge against the plaintiff for recovery of the difference between the \$1400 contract price for the truck in question and the actual selling price of the same as fixed by the Office of Price Administration, the latter being not to exceed

[illegible]

§515. If these allegations are taken as true, the counter-claim, in itself, would be a good defense to plaintiff's action. (State Bank of Blue Island v. Kott, 323 Ill. App. 27). When, on the application of a defendant to open a judgment by confession, the verified motion shows that his defense, if sustained, would be a good one and that a question is presented which should be submitted to the Court or Jury, the Court should set aside the judgment and permit the defense to be made. (Stranak v. Tomasovic, supra).

The defendants, T. W. Doss and W. A. Doss, urge other reasons for vacating the judgment, but discussion of these is unnecessary inasmuch as when a judgment against the maker is vacated, the same relief is afforded the endorsers.

In accordance with the views herein expressed, this Court feels that the defendants were entitled to the relief sought. The judgment of the Circuit Court is reversed and the cause remanded with directions to allow both motions to re-open the judgment and for leave to plead to the merits and to file counter-claim, all in due course.

Reversed and remanded
with directions.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JOHN W. BROWN, DECEASED.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JOHN W. BROWN, DECEASED.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JOHN W. BROWN, DECEASED.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JOHN W. BROWN, DECEASED.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JOHN W. BROWN, DECEASED.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

IN THE MATTER OF THE ESTATE OF JOHN W. BROWN, DECEASED.

THE COURT OF APPEALS IN THE CIRCUIT COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JOHN W. BROWN, DECEASED.

APPEAL FROM THE DECISION OF THE DISTRICT COURT OF THE DISTRICT OF COLUMBIA

43450

J. EDWARD JONES, Assignee,
Plaintiff-Appellant,

v.

BENJAMIN I. SALINGER, JR., et al.,
Defendants,

HOWARD BLUM, H. BOOKER, CHICAGO
TITLE AND TRUST CO., as Escrowee
under Escrow No. 141378,
Appellees.

364 A
APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

329 I.A. 177²

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On September 27, 1944 plaintiff filed a complaint in the Superior court which was amended the following day, alleging that on May 2, 1931 and on September 17, 1934, judgments were rendered against Benjamin I. Salinger, Jr., in the respective amounts of \$876.31 and \$379.80, and costs; that executions were duly issued and returned unsatisfied on each judgment; that the judgments were assigned to plaintiff on September 27 and 20, 1944, respectively; that Salinger is insolvent and has no property in the State of Illinois subject to execution; that there are several unsatisfied judgments (of undesignated amounts) of record against him; that Salinger has an interest in insurance policies, money, stocks, bonds, notes, real estate and other assets; and that the Chicago Title and Trust Company holds money in escrow, nominally for Salinger and the defendant Booker, but actually for Salinger. The complaint, which is in aid of execution, sought to subject the escrow to the satisfaction of the aforesaid judgments; it does not allege that Salinger fraudulently conveyed any assets to any of the defendants, and is therefore not what is commonly known as a creditor's bill to set aside a fraudulent conveyance. Despite the fact that more than thirteen and ten years, respectively, had passed since the judgments were entered, there is no allegation that the

J. HOWARD JONES, Assignee,
Plaintiff-Appellant,

v.

BENJAMIN I. SALINGER, et al.,
Defendants,

ROMANO MUM, H. MUM, CHICAGO
TRUST AND TRUST CO., as Escrowee
Under Escrow No. 14230,
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY,

882 I.A. 178

THE FOLLOWING OPINION WAS DELIVERED BY THE COURT.

On September 20, 1944 plaintiff filed a complaint in the Superior Court which was amended the following day, alleging that on May 2, 1941 and on September 17, 1944 judgments were rendered against Benjamin I. Salinger, Jr., in the respective amounts of \$76.31 and \$379.80, and costs; that executions were duly issued and returned unsatisfied on each judgment; that the judgments were assigned to plaintiff on September 17 and 20, 1944, respectively; that Salinger is insolvent and has no property in the State of Illinois subject to execution; that there are several unsatisfied judgments (of undesignated amounts) of record against him; that Salinger has an interest in insurance policies, money, stocks, bonds, notes, real estate and other assets; and that the Chicago Title and Trust Company holds money in escrow, nominally for Salinger and the defendant Booker, but actually for Salinger. The complaint, which is in aid of execution, sought to subject the escrow to the satisfaction of the aforesaid judgments; it does not allege that Salinger fraudulently conveyed any assets to any of the defendants, and is therefore not what is commonly known as a creditor's bill to set aside a fraudulent conveyance. Despite the fact that more than thirteen and ten years, respectively, had passed since the judgments were entered, there is no allegation that the

judgments were revived by scire facias or otherwise. Salinger, the judgment debtor, was not served with summons, did not participate in the trial of the cause, and is not taking part in this appeal.

The defendant Booker, after filing an answer claiming one-half of the escrow fund as her own property, obtained leave of the court to file a motion to strike the amended and supplemental complaint, charging that the judgments were dormant and had not been revived by scire facias; that the complaint did not state a cause of action; that there was no showing that plaintiff had exhausted his remedies at law, and therefore no ground existed for the assumption of jurisdiction by a court of equity of the creditor's proceeding.

Howard Blum, who was granted leave to intervene and become a party defendant, filed his answer and counterclaim, alleging that Salinger had assigned his interest in the escrow to Blum prior to the purchase of the judgments by plaintiff, and in his answer he alleged that plaintiff's judgments were dormant, more than seven years old, and had not been revived by scire facias. Plaintiff moved to strike that paragraph of Blum's answer which set forth the foregoing defense. The court carried plaintiff's motion back to the amended complaint, sustained said motion as against the complaint, also sustained defendant Booker's motion to strike the amended complaint and dissolved the temporary injunctions which had been issued when the complaint was filed. Upon plaintiff's election to stand by his amended and supplemental complaint, the court dismissed the suit for want of equity, and this appeal by plaintiff followed.

Although plaintiff raises 23 separate propositions as ground for reversal, the gravamen of his contentions is that his amended and supplemental complaint stated a good cause of

Judgments were revived by seque facias or otherwise. Defendant, being the defendant debtor, was not served with summons, did not participate in the trial of the cause, and is not taking part in this appeal.

The defendant Bookers, after filing an answer claiming ownership of the escrow fund as her own property, obtained leave of the court to file a motion to strike the amended and supplemental complaint, alleging that the judgments were dormant and had not been revived by seque facias; that the complaint did not state a cause of action; that there was no showing that plaintiff had exhausted his remedies at law, and therefore no ground existed for the assumption of jurisdiction by a court of equity of the creditor's proceeding.

Howard Blum, who was granted leave to intervene and become a party defendant, filed his answer and counterclaim, alleging that defendant had assigned his interest in the escrow to Blum prior to the purchase of the judgments by plaintiff, and in his answer he alleged that plaintiff's judgments were dormant, more than seven years old, and had not been revived by seque facias. Plaintiff moved to strike that paragraph of

Blum's answer which set forth the foregoing defense. The court refused plaintiff's motion back to the amended complaint, sustained said motion as against the complaint, also sustained defendant Bookers' motion to strike the amended complaint and dismissed the temporary injunction which had been issued when the complaint was filed. Upon plaintiff's election to stand by his amended and supplemental complaint, the court dismissed the writ for want of equity, and this appeal by plaintiff followed.

Although plaintiff raises 23 separate propositions as ground for reversal, the gravamen of his contention is that his amended and supplemental complaint stated a good cause of

action; that the judgments were not 20 years old, and executions on each of them having been once returned no part satisfied, the debtor's insolvency confessed, and the choses in action sought to be subjected to the payment of the judgments not being subject to execution and levy, revival of the judgments would be useless acts; that while they were being revived, the debtor would take the money, irreparable damage would follow, and plaintiff would have no adequate remedy at law. He further contends that "in a scire facias to revive the judgments the only issues that could arise are the non-existence of the judgments or their satisfaction or release which are issues in this case which can be tried as well by a court of chancery as by a court of law; that the motions to strike admit the recovery and existence of the judgments and that they are unpaid and are in full force and effect; that since scire facias is merely a continuation of the original suit, the requirement that the judgments be revived is purely technical and does not advance justice or the merits of the case"; and he urges that if the court believed that the judgments ought to be revived, it should have followed the New York procedure of retaining the complaint until the judgments could be revived and executions returned.

Plaintiff's contention that it was not necessary for him to revive the judgments is predicated primarily on the general allegation of Salinger's insolvency which is as follows: "That the defendant, Benjamin I. Salinger Jr., is insolvent and has no property in the State of Illinois subject to execution and that there are several unsatisfied judgments of record against him." But, in the succeeding paragraph of his amended complaint, he contradicts the foregoing allegation by charging that Salinger has "an interest in insurance

attorney at the time the judgment was not yet a year old, and execution on each of them having been once returned no part satisfied, the debtor's insolvency continued, and the choses in action ought to be subjected to the payment of the judgments not being subject to execution and levy, revival of the judgments would be unjust and inequitable; that while they were being

revived, the debtor would lose the money, irreparable damage would follow, and plaintiff would have no adequate remedy at law. The court's conclusion that in a revival of the judgments the only issues that could arise are the non-existence of the judgments or their satisfaction or release which are framed in this case which can be tried as well by a court of equity as by a court of law; that the motions to revive admit the recovery and existence of the judgments and that they are unpaid and are in full force and effect; that since revival is merely a continuation of the original suit, the requirement that the judgments be revived is purely technical and does not involve justice or the merits of the case; and he urges that if the court believed that the judgments ought to be revived, it should have followed the New York procedure of retaining the copy until the judgments could be revived and conditions returned.

Plaintiff's argument that it was not necessary for him to revive the judgments is predicated primarily on the general allegation of defendant's insolvency which is as follows: "That the defendant, Benjamin J. Selinger Jr., is insolvent and has no property in the State of Minnesota subject to execution and that there are several unsatisfied judgments of record against him." But, in the preceding paragraph of his verified complaint, he contradicts the foregoing allegation by charging that Selinger was "an interest in insurance

policies with a cash surrender value, moneys, stocks, bonds, promissory notes, bills of exchange, judgments, mortgages, deeds of trust, debts, evidences of indebtedness, safety deposit boxes or other choses in action, or equitable property or other thing of value in this State, or real estate, or interest in real estate in other States, in which he has some interest beneficially, or which is held for him in trust or by some nominee or dummy, which should be applied to the payment of the above judgments." It is urged that the motions to strike the amended complaint admitted Salinger's insolvency. However, under the established rule that motions to strike admit only well-pleaded facts, the chancellor would not have been justified in holding that Salinger's insolvency was admitted, in view of the foregoing quoted allegations of the complaint which are a plain contradiction of the general allegation of insolvency in the preceding paragraph. Moreover, the complaint alleges that the Chicago Title and Trust Company holds money in escrow for Salinger, and its answer admits that it holds \$23,000 in the escrow fund. Therefore, if plaintiff's claim that the entire fund belongs to Salinger is correct, the amount held in escrow would be more than sufficient to satisfy both judgments, plus interest and costs, and upon the record presented it would appear that Salinger was not insolvent when the complaint was filed. Plaintiff seeks to minimize the effect of these allegations by calling attention to his charge that there are several other unsatisfied judgments of record against Salinger. The complaint does not specify the amounts of these judgments, and it may therefore well be that their aggregate amount, when added to the two judgments for \$876.31 and \$379.80, respectively, upon which the complaint is predicated, would still leave sufficient sums in the escrow fund of \$23,000 to enable

leave sufficient sums in the escrow fund of \$25,000 to enable
thively, upon which the complaint is predicated, would still
added to the two judgments for \$875.31 and \$379.80, respec-
The complaint does not specify the amounts of these judgments,
several other unsatisfied judgments of record against Salinger.
allegations by calling attention to his charge that there are
filing. Plaintiff seeks to minimize the effect of these
appear that Salinger was not insolvent when the complaint was
interest and costs, and upon the record presented it would
would be more than sufficient to satisfy both judgments, plus
fund belongs to Salinger is correct, the amount held in escrow
escrow fund. Therefore, if plaintiff's claim that the entire
Salinger, and the answer admits that it holds \$25,000 in the
Chicago title and trust company holds money in escrow for
ceding paragraph. Moreover, the complaint alleges that the
diction of the general allegation of insolvency in the pre-
quoted allegations of the complaint which are a plain contra-
Salinger's insolvency was admitted, in view of the foregoing
chancellor would not have been justified in holding that
that motions to strike admit only well-pleaded facts, the
Salinger's insolvency. However, under the established rule
that the motions to strike the amended complaint admitted
be applied to the payment of the above judgments." It is urged
for him in trust or by some nominee or dummy, which should
which he has some interest beneficially, or which is held
estate, or interest in real estate in other states, in
property or other thing of value in this state, or real
deposit boxes or other choses in action, or equitable
needs of trust, debts, evidences of indebtedness, safety
promissory notes, bills of exchange, judgments, mortgages,
policies with cash surrender value, money, stocks, bonds,

plaintiff to recover the amount due him by legal process.

The essence of the controversy between the parties is whether plaintiff's action can be maintained when the complaint on its face shows that the judgments on which the complaint is predicated are more than seven years old and have not been revived by scire facias. Plaintiff concedes that his suit is in the nature of an equitable execution. Section 6, chapter 77, Ill. Rev. Stat. 1945, provides that "no execution shall issue upon any judgment after the expiration of seven years from the time the same becomes a lien, except upon the revival of the same by scire facias. ***." The authorities in this state are uniformly to the effect that the purpose of a creditor's bill such as in the case at bar is to reach assets which are not subject to seizure on execution, and the procedure as developed in equity and adopted by our statute was designed for the purpose of reaching such assets, and is in the nature of an equitable execution. Thus in Press & Co. v. Fahy, 313 Ill. 262, the court made the following pertinent observations: "A creditor's bill may be defined as a bill brought by a creditor who has obtained a judgment at law and has in vain attempted at law to obtain satisfaction and who sues in equity for the purpose of reaching property which can not be taken on execution at law. The nature, purpose and scope of such a bill are to bring into exercise the equitable powers of the court to enforce the satisfaction of a judgment by means of an equitable execution because execution at law cannot be had. The rule is that chancery will not, in the absence of statute, aid a judgment creditor to enforce his judgment against property incapable of being reached by any common law process where there is no element of fraud or trust as a ground for equitable relief. 8 R. C. L. 2; Addyston Pipe Co. v. City of Chicago, 170 Ill.

plaintiff to recover the amount due him by legal process.
The essence of the controversy between the parties
is whether plaintiff's action can be maintained when the
complaint on its face shows that the judgments on which the
complaint is predicated are more than seven years old and
have not been revived by equitable facies. Plaintiff contends
that his suit is in the nature of an equitable execution.
Section 5, Chapter 77, Ill. Rev. Stat. 1943, provides that
"no execution shall issue upon any judgment after the ex-
piration of seven years from the time the same becomes a lien,
except upon the revival of the same by equitable facies."
The authorities in this state are uniformly to the effect
that the purpose of a creditor's bill such as in the case at
bar is to reach assets which are not subject to seizure on
execution, and the procedure as developed in equity and
adopted by our statute was designed for the purpose of reaching
such assets, and is in the nature of an equitable execution.
Thus in In re Estate of V. V. V. Ill. 1943, the court made the
following pertinent observations: "A creditor's bill may be
defined as a bill brought by a creditor who has obtained a
judgment at law and has an attorney at law to obtain
satisfaction and who uses in equity for the purpose of reaching
property which can not be taken on execution at law. The
nature, purpose and scope of such a bill are to bring into
exercise the equitable powers of the court to enforce the
satisfaction of a judgment by means of an equitable execution
because execution at law cannot be had. The rule is that
equity will not, in the absence of statute, aid a judgment
creditor to enforce his judgment against property inoperative of
being reached by any common law process where there is no
element of fraud or trust as a ground for equitable relief.
8 R. C. L. 2; Wynston v. City of Chicago, 170 Ill.

580." Under the foregoing quoted section of the statute an execution at law cannot be issued upon a judgment which is more than seven years old, and under the settled rule that equity follows the law, a creditor's bill being an equitable execution, cannot be filed on a judgment more than seven years old which has not been revived. This rule has been applied by the courts of this state in garnishment proceedings which, in Fidelity Coal Co. v. Diamond, 322 Ill. App. 229, were held to be analogous to a creditor's bill. In Ring v. Palmer, 309 Ill. App. 333, it was held that a judgment on which garnishment proceedings were brought became dormant by expiration of the seven-year period without revival, and that another judgment creditor holding a subsequent judgment that was not dormant and intervening to claim priority as to the funds garnisheed, was properly held to be entitled to them. The court there pointed out that garnishment, being a statutory proceeding, "is ancillary in nature and is designed for the purpose of aiding the collection of a judgment rendered in the principal action. Both an execution and the proceedings in garnishment derive their support from the main judgment. Under the decisions, if the main judgment fails, the rights acquired under the garnishment cease. *** There is no provision in the statute that the commencement of a garnishment proceeding during the 7-year period shall operate to continue the life of such garnishment proceeding after the judgment on which it is based has become dormant by limitation." In Selimos v. O'Brien, Gen. No. 42232 (not published in full), we followed the doctrine enunciated in Ring v. Palmer, holding that garnishment proceedings could not be predicated upon a dormant judgment, citing, in addition to other decisions, the case of First Nat. Bank of Palatine v. Hahnemann Inst., 356 Ill. 366, which holds that the

"Under the foregoing stated section of the statute an execution at law cannot be issued upon a judgment which is more than seven years old, and under the settled rule that equity follows the law, a creditor's bill being an equitable execution, cannot be filed on a judgment more than seven years old which has not been revived. This rule has been applied by the courts of this state in garnishment proceedings which, in Equity Coal Co. v. Johnson, 322 Ill. App. 229, were held to be analogous to a creditor's bill. In King v. Palmer, 309 Ill. App. 235, it was held that a judgment on which garnishment proceedings were brought became dormant by expiration of the seven-year period without revival, and that another judgment creditor holding a subsequent judgment that was not dormant and intervening to claim priority as to the funds furnished, was properly held to be entitled to them. The court there pointed out that garnishment, being a statutory proceeding, "is ancillary in nature and is designed for the purpose of aiding the collection of a judgment rendered in the principal action. Both an execution and the proceedings in garnishment derive their support from the main judgment. Under the decisions, if the main judgment fails, the rights secured under the garnishment cease. *** There is no provision in the statute that the commencement of a garnishment proceeding during the 7-year period shall operate to continue the life of such garnishment proceeding after the judgment on which it is based has become dormant by limitation." In Johnson v. O'Brien, Gen. No. 4232 (not published in Ill.), we followed the doctrine enunciated in King v. Palmer, holding that garnishment proceedings could not be predicated upon a dormant judgment, citing, in addition to other decisions, the case of First Nat. Bank of Chicago v. Chicago & North Western Indt., 356 Ill. 366, which holds that the

existence of a valid judgment against the principal defendant is a jurisdictional prerequisite in a proceeding under the Garnishment Act. It would therefore logically follow that if a creditor's bill is analogous in principle to a garnishment proceeding, the same rule ought to apply, and that a valid judgment would be a prerequisite to maintain the action.

We have always considered the rule well settled that the plaintiff must exhaust his remedies at law before equity will assume jurisdiction of a creditor's complaint to reach equitable assets. In this proceeding plaintiff is seeking to subject equitable assets which he alleges he is not able to reach by execution, to the payment of his judgment. If he were suing on a live judgment, he would be required to show that he had exhausted his remedies at law by alleging the entry of the judgment and the issuance and return of an execution unsatisfied. In Hart v. Oliver, 296 Ill. 209, the court indicated the proper practice in such proceedings by the following statement of the rule: "The object of the proper return of the execution is to show that the judgment creditor has exhausted all his remedies at law before he applies to the chancery courts for relief. When a creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to a levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and getting an execution returned nulla bona before he can come into a court of equity for the purpose of reaching the equitable estate of the defendant. This is necessary to give the court jurisdiction. Why? Otherwise it would not appear but that the party has a complete remedy at law." (Citing Illinois cases.) Our courts have gone so far as to hold that even if an execution has been returned unsatisfied, the plaintiff's remedies at law will not be held

existence of a valid judgment against the principal defendant is a jurisdictional prerequisite in a proceeding under the Garnishment Act. It would therefore logically follow that if a creditor's bill is analogous in principle to a garnishment proceeding, the same rule ought to apply, and that a valid judgment would be a prerequisite to maintain the action. I have always considered the rule well settled that the plaintiff must exhaust his remedies at law before equity will assume jurisdiction of a creditor's complaint to reach equitable assets. In this proceeding plaintiff is seeking to subject equitable assets which he alleges he is not able to reach by execution, to the payment of his judgment. If he were suing on a live judgment, he would be required to show that he had exhausted his remedies at law by alleging the entry of the judgment and the issuance and return of an execution unsatisfied. In Hart v. Oliver, 220 Ill. 209, the court indicated the proper practice in such proceedings by the following statement of the rule: "The object of the proper return of the execution is to show that the judgment creditor has exhausted all his remedies at law before he applies to the chancery courts for relief. When a creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to a levy and sale under an execution at law, he must exhaust his remedy at law by obtaining judgment and getting an execution returned unsatisfied, before he can come into a court of equity for the purpose of reaching the equitable estate of the defendant. This is necessary to give the court jurisdiction. Why? Otherwise it would not appear but that the party has a complete remedy at law." (citing Illinois cases.) Our courts have gone so far as to hold that even if an execution has been returned unsatisfied, the plaintiff's remedies at law will not be held

to have been exhausted if the execution was returned by order of the plaintiff's attorney. Stirlen v. Jewett, 165 Ill. 410; Scheubert v. Honcl, 152 Ill. 313. As applicable to these principles of law, the record in this proceeding merely indicates that the executions against Salinger were uncollectible in 1931 and 1934, but there is nothing of record to warrant the presumption that they were still uncollectible in 1944 when this suit was instituted. Plaintiff had made no attempt whatsoever to collect either of the judgments at law after he purchased them, but filed this proceeding immediately after the purchase. There is no apparent reason why the legal remedy of revival of the judgments by scire facias proceedings and subsequent execution should not be followed by plaintiff. He seeks to relieve himself of this prerequisite to the filing of a creditor's bill by arguing that in such event the escrow fund would no longer be available. Even if that were true, such an argument, if allowed to prevail, would obviate the necessity of a scire facias.

The defendants cite and on oral argument emphasized the holding in the early case of Crawford v. Cook, 55 Ill. App. 351. In that case judgment had been entered against defendant Crawford in 1877, and execution was issued and returned unsatisfied. The judgment was revived by scire facias in 1888, but no execution was issued upon the revived judgment. Thereafter the plaintiff filed a creditor's bill alleging that certain property had been conveyed to the wife of the judgment defendant which in reality belonged to and was held in trust for him. A default judgment was entered in favor of plaintiff, which was reversed on appeal. The court held that plaintiff had not exhausted his remedies at law because he had not issued execution on the judgment after it was revived, saying: "And it is quite certain that no execution was issued after the judgment was revived on scire facias, for the bill was filed the same day. That revival should have

to have been exhausted in the execution was returned by order of the plaintiff's attorney. Wright v. Lewis, 107 Ill. 410; Wright v. Lewis, 107 Ill. 410. As applicable to these principles of law, the record in this proceeding merely indicates that the executions against Salinger were uncollectible in 1931 and 1932, but there is nothing of record to warrant the presumption that they were still uncollectible in 1944 when this suit was instituted. Plaintiff had made no attempt whatsoever to collect either of the judgments at law after he purchased them, but filed this proceeding immediately after the purchase. There is no apparent reason why the legal remedy of revival of the judgments by scire facias proceedings and subsequent execution should not be followed by plaintiff. He seeks to relieve himself of this prerequisite to the filing of a creditor's bill by arguing that in such event the escrow fund would no longer be available. Even if that were true, such an argument, if allowed to prevail, would obviate the necessity of a scire facias. The defendants cite and on oral argument emphasized the holding in the early case of Grawford v. Gook, 55 Ill. App. 321. In that case judgment had been entered against defendant Grawford in 1877, and execution was issued and returned unsatisfied. The judgment was revived by scire facias in 1888, but no execution was issued upon the revived judgment. Thereafter the plaintiff filed a creditor's bill alleging that certain property had been conveyed to the wife of the judgment defendant which in reality belonged to and was held in trust for him. A default judgment was entered in favor of plaintiff, which was reversed on appeal. The court held that plaintiff had not exhausted his remedies at law because he had not issued execution on the judgment after it was revived, saying: "and it is quite certain that no execution was issued after the judgment was revived on scire facias, for the bill was filed the same day. That revival should have

been followed by an execution. Non constat that it would not have produced satisfaction." It will be noted that in the Crawford case plaintiff complied with one of the prerequisites by reviving the judgment. Nevertheless, the court held that both revival and the issuance of an execution were required, since otherwise it would be impossible to say whether the revival and issuance of the new execution would not have produced satisfaction.

One of the principal contentions advanced by plaintiff is that a dormant judgment will support a creditor's bill. If this were true it would, in effect, operate to nullify section 6 of chapter 77, Ill. Rev. Stat. 1945, which is quoted earlier in this opinion, and if plaintiff's contention were sustained any judgment creditor could file a creditor's bill instead of garnishment proceedings and obviate the necessity of having his judgment revived, or he could file a creditor's bill and obtain an execution, in effect, without reviving the judgment, as required by statute. Plaintiff relies principally on Brown v. Long, (1838) 36 N. C. 138, in support of his contention that where a judgment is dormant in the sense that an execution cannot be issued without scire facias, it will support a creditor's complaint to subject choses in action to the payment of such judgment, and characterizes it as the only case in the United States that is "on all fours" with the facts in this proceeding. In that case Long was indebted to Campbell, one of the plaintiffs, in the sum of \$1000, and executed his bond therefor with Brown, another of the plaintiffs, his surety. On that bond Campbell took judgment at law for principal, interest and costs, and thereupon issued a capias ad satisfaciendum on which Long was arrested and from which he was discharged as an insolvent debtor. Subsequently Brown made a satisfactory arrangement with Campbell for the debt, and took an assignment

been followed by an execution. Non constat that it would not have produced satisfaction." It will be noted that in the Griffin case plaintiff concluded with one of the preceding chapters by reviving the judgment. Nevertheless, the court held that both reviv I and the issuance of an execution were required, since otherwise it would be impossible to say whether the reviv I and issuance of the new execution would not have produced satisfaction.

One of the principal contentions advanced by plaintiff is that a dormant judgment will support a creditor's bill. It is true that it would, in effect, operate to nullify section 2 of chapter 77, III. Rev. Stat. 1947, which is quoted earlier in this opinion, and if plaintiff's contention were sustained any judgment creditor could file a creditor's bill instead of reinstatement proceedings and obviate the necessity of having his judgment revived, or he could file a creditor's bill and obtain an execution, in effect, without reviving the judgment, as required by statute. Plaintiff relies principally on Brown v. Long, (1938) 16 N. E. 2d 130, in support of his contention that where a judgment is dormant in the sense that an execution cannot be issued without some facts, it will support a creditor's complaint to subject choses in action to the payment of such judgment, and characterizes it as the only case in this Circuit that is "on all fours" with the facts in this proceeding. In that case Long was indebted to Campbell, one of the plaintiffs, in the sum of \$1000, and executed his bond therefor with Brown, another of the plaintiffs, his surety. On that bond Campbell took judgment at law for principal, interest and costs, and thereupon issued a capias ad satisfaciendum on which Long was arrested and from which he was discharged as an insolvent debtor. Subsequently Brown made a satisfactory arrangement with Campbell for the debt, and took an assignment

of the judgment in trust for Brown. The defendant Long was also indebted to plaintiff Brown on another account, for which judgment was rendered, and Long was arrested and discharged as in the other case. Brown, Campbell and other plaintiffs thereupon filed a bill against Long and others alleging that Long had no visible estate out of which any part of those debts could be satisfied, but that since his discharge from imprisonment he had been engaged in certain profitable speculations by which one Huie had become indebted to him. The bill charged that certain colorable assignments to Huie were made without consideration, and that a secret trust had been created which was intended to enable the assignees to collect the money for the use of Long and to avoid the payment of the judgments against him and thus elude any process that could be legally issued thereon. The bill also alleged that plaintiffs had no remedy at law, and could not find any estate liable to their debts. Defendants interposed a general demurrer which was sustained by the chancellor, but the decree was reversed on appeal, the court holding, in effect, that when a debtor has been discharged under the North Carolina statute for the relief of insolvents so that his body cannot be again taken in execution for the debt, any choses in action or other property not subject to an execution at law which he may afterward acquire, may be reached in equity, and that in view of the declaration of the provision of the statute that no execution shall be again issued against the body of the discharged debtor but that one may issue against "any estate" which he may subsequently acquire, it was the duty of a court of equity to provide a remedy for the creditor when the estate of the debtor is of such a nature that it cannot be reached by an execution at law. Plaintiff's brief does not set out the North Carolina statute, but the court's opinion

of the judgment in favor of Brown. The defendant Long was also indebted to Plaintiff Brown on another account, for which judgment was rendered, and Long was arrested and discharged as in the other cases. Brown, Campbell and other plaintiffs thereupon filed a bill against Long and others alleging that Long had no visible estate out of which any part of those debts could be satisfied, but that since his discharge from imprisonment he had been engaged in certain profitable speculations by which one rule had become indebted to him. The bill charged that certain colorable assignments to him were made without consideration, and that a secret trust had been created which was intended to enable the assignees to collect the money for the use of Long and to avoid the payment of the judgments against him and thus elude any process that could be legally issued thereon. The bill also alleged that plaintiffs had no remedy at law, and could not find any estate liable to their debts. Defendants interposed a general demurrer which was sustained by the chancellor, but the decree was reversed on appeal, the court holding, in effect, that when a debtor has been discharged under the North Carolina statute for the relief of insolvents so that his body cannot be again taken in execution on the debt, any choses in action or other property not subject to an execution at law which he may afterward acquire, may be reached in equity, and that in view of the declaration of the provision of the statute that no execution shall be again issued against the body of the discharged debtor but that one may issue against "any estate" which he may subsequently acquire, it was the duty of a court of equity to provide a remedy for the creditor when the estate of the debtor is of such a nature that it cannot be reached by an execution at law. Plaintiff's brief does not set out the North Carolina statute, but the court's opinion

indicates that the statutes of North Carolina over a century ago were different from those now in effect in this state, and that may well be the ground upon which the case can be fairly distinguished. In any event, the rule laid down in Brown v. Long is at variance with the decisions of our courts.

Reverting to plaintiff's contention that an allegation of insolvency is sufficient to excuse him from ~~reviving~~ the judgments, we have searched without avail for any decisions in this state supporting that contention. Defendants' counsel stated on oral argument that they knew of no such cases, and their statement remained uncontradicted.

In the light of the foregoing conclusions we are impelled to hold that since the judgments on which plaintiff's action is predicated, are dormant judgments, no proceeding can be maintained on them until they are revived and executions on the revived judgments issued and returned unsatisfied. To hold otherwise would be at variance with the theory and practice upon which creditor's bills are predicated and the decisions specifying the prerequisites to the maintenance of such proceedings. The decree of the Superior court is therefore affirmed.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

indicating that the statutes of North Carolina over a century ago were different from those now in effect in this state, and that they will be the ground upon which the case can be fairly distinguished. In any event, the rule laid down in Brown v. Board of Education is at variance with the decisions of our

courts.

Nothing to plaintiff's contention that an allegation of insolvency is sufficient to excuse him from reviving the judgments, we have accepted without avail for any decisions in this state supporting that contention. Defendants' counsel stated on oral argument that they knew of no such cases, and their statement remained uncontradicted.

In the light of the foregoing conclusions we are impelled to hold that since the judgments on which plaintiff's action is predicated, are dormant judgments, no proceeding can be maintained on them until they are revived and execution on the revived judgments issued and returned unsatisfied. To hold otherwise would be at variance with the theory and practice upon which creditor's bills are predicated and the decisions specifying the prerequisites to the maintenance of such proceedings. The decree of the Superior Court is therefore affirmed.

DEBORAH A. HARRIS.

William and Wilhelmina, Jr., counsel.

43480

In the Matter of
THE ESTATE OF AUGUSTA
P. KROENING, Deceased.

SELMA KROENING,
Appellee,

v.

ELEANOR RICHARDS,
Appellant.

365
APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

A
329 I.A. 178'

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Selma Kroening filed a claim in the Probate court against the estate of her deceased mother, Augusta P. Kroening, for the reasonable value of nursing and housekeeping services rendered during the last ten years of her mother's life, at the rate of \$25.00 a week, or a total of \$13,325. The Probate court allowed the claim for \$6500 for the last five years, the earlier period having been barred by the statute of limitations. Eleanor Richards, claimant's sister, and one of the heirs of the decedent, hereinafter referred to as respondent, took an appeal to the Circuit court, where the claim was again allowed for \$6500. Eleanor Richards alone appeals from that order.

The essential facts disclose that Augusta P. Kroening, a widow, died intestate on April 8, 1943 at the age of 87 years. She was survived by her sons, Henry, Charles and Arthur Kroening, and her daughters, Eleanor Richards and Selma Kroening. In September 1933, at the age of 77, the deceased fractured her hip, and thereafter, until the time of her death, she was unable to get about or to walk unassisted. At her mother's request, claimant, who had been employed elsewhere, moved into her mother's household shortly after the accident, and continued to live there with her and her (Selma's) brother Arthur until her mother's death. Her services consisted of nursing, cooking,

In the matter of
THE ESTATE OF AUGUSTA
P. KROENING, Deceased.

SELMA KROENING,
Appellee,

v.

ELEANOR RICHARDS,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

3281A.178

MR. PRESIDING JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Selma Kroening filed a claim in the Probate court against the estate of her deceased mother, Augusta P. Kroening, for the reasonable value of nursing and housekeeping services rendered during the last ten years of her mother's life, at the rate of \$25.00 a week, or a total of \$13,325. The Probate court allowed the claim for \$6900 for the last five years, the earlier period having been barred by the statute of limitations.

Eleanor Richards, claimant's sister, and one of the heirs of the deceased, hereinafter referred to as respondent, took an appeal to the Circuit court, where the claim was again allowed for \$6900. Eleanor Richards alone appeals from that order.

The essential facts disclose that Augusta P. Kroening, a widow, died intestate on April 8, 1943 at the age of 87 years. She was survived by her sons, Henry, Charles and Arthur Kroening, and her daughters, Eleanor Richards and Selma Kroening. In September 1933, at the age of 77, the deceased fractured her hip, and thereafter, until the time of her death, she was unable to get about or to walk unassisted. At her mother's request, claimant, who had been employed elsewhere, moved into her mother's household shortly after the accident, and continued to live there with her and her (Selma's) brother Arthur until her mother's death. Her services consisted of nursing, cooking,

housekeeping, and taking care of her mother for the entire period of approximately ten years. There is substantially no dispute in the evidence that the decedent hired claimant and agreed to compensate her for her services, and it is conceded that these services were performed by claimant during the last ten years of her mother's life, but respondent argues that claimant failed to overcome the presumption of payment (In re Estate of Moore, 310 Ill. App. 365), and failed to prove by clear and convincing evidence that she was not paid.

The salient testimony of the witnesses called on behalf of claimant may be summarized as follows. Arthur Kroening lived with his mother 46 years prior to her death. About four months after the accident the doctor told Mrs. Kroening that she would never be able to walk again, and she then told Arthur that Selma would have to take care of her and look after the household, and she said "she would take care of her the same as if she was working." Another brother, Henry Kroening, who was married but visited his mother frequently, testified that about six months after the accident he had a conversation with his mother wherein she expressed satisfaction that Selma was back helping her, and that his mother said "she take care of her sometime or other for her work there." Mathilda Molzahn, one of the deceased's oldest friends, lived in the immediate neighborhood and visited Mrs. Kroening frequently. She testified that before the accident "Selma, did shorthand. I don't know the firm that she worked for"; that during the last ten years of decedent's life Selma attended to all the household duties, that she cleaned, sewed, washed dishes, cooked and did the necessary housework. In addition to that she nursed the deceased, took her to and from the bathroom, dressed her, fed her and administered medicine. About a year after the accident

housekeeping, and taking care of her mother for the entire period of approximately ten years. There is substantially no dispute in the evidence that the deceased hired claimant and agreed to compensate her for her services, and it is

conceded that these services were performed by claimant during the last ten years of her mother's life, but respondent argues that claimant failed to overcome the presumption of payment (In re Estate of Moore, 110 Ill. App. 3d 557), and failed to prove by clear and convincing evidence that she was not paid. The salient testimony of the witnesses called on behalf

of claimant may be summarized as follows. Arthur Kroening lived with his mother 46 years prior to her death. About four months after the accident the doctor told Mrs. Kroening that she would never be able to walk again, and she then told Arthur that Belma would have to take care of her and look after the household, and she said "she would take care of her the same as if she was working." Another brother, Henry Kroening, who was married but visited his mother frequently, testified that about six months after the accident he had a conversation with his mother wherein she expressed satisfaction that Belma was back helping her, and that his mother said "she takes care of her sometime or other for her work there." Matilda Wolz, one of the deceased's oldest friends, lived in the immediate neighborhood and visited Mrs. Kroening frequently. She testified that before the accident "Belma, did shorthand. I don't know the firm that she worked for"; that during the last ten years of deceased's life Belma attended to all the household duties, that she cleaned, sewed, washed dishes, cooked and did the necessary housework. In addition to that she nursed the deceased, took her to and from the bathroom, dressed her, fed her and administered medicine. About a year after the accident

Mrs. Molzahn overheard a conversation wherein the decedent told Selma that "she earned her money, that she waited on her ***, dressed her and took care of her. *** Mrs. Kroening said she pay Selma just so much than she earned. She said that to me." In a conversation had shortly before Mrs. Kroening's death she said to the witness "I won't live no more but I give Selma *** what comes to her," and in another conversation immediately preceding her death, she said to the witness: "I won't live long anymore, but I will give Selma what belongs to her." Mrs. Molzahn further testified that the deceased bought Selma's clothes, gave her needed expense money, and that "Selma was a good girl to her mother." Henry Kroening testified that he never saw his mother pay Selma anything, and there is no evidence that anything was paid to her for her services during the last ten years of decedent's life. It will be noted that the effect of the testimony of both Arthur and Henry Kroening was to reduce their distributive share in the estate of their deceased mother, and the testimony given by them was therefore against their interest and entitled to considerable weight.

From the foregoing testimony it clearly appears that Selma returned to decedent's home after the accident at her mother's request; that for ten years thereafter she faithfully attended to the household duties which her mother could no longer perform, and nursed the deceased with the greatest care and attention. There is nothing in the record to indicate that the deceased ever paid Selma for these services, and from the testimony of the witnesses who testified in her behalf it appears reasonably clear that Mrs. Kroening expected to compensate Selma for her services. No countervailing proof was offered on this question of fact, and we think the testimony

Mrs. Kolman overheard a conversation wherein the decedent
 told Belma that "she earned her money, that she waited on
 her mother, dressed her and took care of her." Mrs. Kroening
 said she pay Belma just as much as she earned. She said
 that to me. In a conversation had shortly before Mrs. Kroen-
 ing's death she said to the witness "I don't live no more but
 I give Belma what comes to her," and in another conversa-
 tion immediately preceding her death, she said to the witness:
 "I can't live long anymore, but I will give Belma what belongs
 to her." Mrs. Kolman further testified that the deceased
 bought Belma's clothes, gave her needed expense money, and
 that "Belma was a good girl to her mother." Henry Kroening
 testified that he never saw his mother pay Belma anything,
 and there is no evidence that anything was paid to her for
 her services during the last ten years of decedent's life.
 It will be noted that the effect of the testimony of both
 Arthur and Henry Kroening was to reduce their distributive
 share in the estate of their deceased mother, and the testimony
 given by them was therefore against their interest and entitled
 to considerable weight.
 From the foregoing testimony it clearly appears that
 Belma returned to decedent's home after the accident at her
 mother's request; that for ten years thereafter she faithfully
 attended to the household duties which her mother could no
 longer perform, and nursed the deceased with the greatest
 care and attention. There is nothing in the record to indicate
 that the deceased ever paid Belma for these services, and from
 the testimony of the witnesses who testified in her behalf it
 appears reasonably clear that Mrs. Kroening expected to com-
 pensate Belma for her services. No countervailing proof was
 offered on this question of fact, and we think the testimony

of claimant's witnesses amply rebuts any presumption of payment.

As to the reasonable value of Selma's services, claimant called Wega Wargren, a nurse, who testified that she had been connected with a nurses' employment agency in Chicago for some eighteen years; that she had frequently had occasion to employ nurses and was familiar with the wages or salary paid for practical nursing during the last ten years of decedent's life; and that the reasonable compensation for such services was upward of \$25.00 a week. Like testimony was given by George H. Dexter, head of the Marie Louise Employment Agency, with respect to the reasonable value of services for housemaids. Since claimant performed both the duties of a maid and a nurse, the \$25.00 a week basis upon which the court computed her claim cannot seriously be questioned. Under the circumstances we are convinced that the chancellor properly found in favor of claimant, and that the allowance of \$6500 for the last five years of her services was admittedly fair and reasonable.

The only other ground urged for reversal is that the court excluded respondent's testimony that the deceased had considerable cash in a dresser drawer in the dining room of her home with which she could have paid for Selma's services. The questions asked by respondent's attorney of Arthur Kroening are as follows:

"Mr. Wachowski: Now, then, your mother had considerable cash in a dresser drawer in the dining room of the Wood Street property, did she not? Mr. Schusterman [attorney for claimant]: I object, your Honor. The Court: Read the question. (Whereupon question read.) The Court: Objection sustained. *** Mr. Wachowski: Did your mother have access

of claimant's witnesses amply rebuts any presumption of payment.

As to the reasonable value of Selma's services, claimant called Miss Margaret, a nurse, who testified that she had been connected with a nurses' employment agency in Chicago for some eighteen years; that she had frequently had occasion to employ nurses and was familiar with the wages or salary paid for practical nursing during the last ten years of defendant's life; and that the reasonable compensation for such services was upward of \$17.00 a week. Like testimony was given by George H. Dexter, head of the Marie Louise Employment Agency, with respect to the reasonable value of services for housemaids. Miss claimant performed both the duties of a maid and a nurse, the \$25.00 a week basis upon which the court computed her claim cannot seriously be questioned. Under the circumstances we are convinced that the chancellor properly found in favor of claimant, and that the allowance of \$6500 for the last five years of her services was admittedly fair and reasonable.

The only other ground urged for reversal is that the court excluded respondent's testimony that the deceased had considerable cash in a dresser drawer in the dining room of her home with which she could have paid for Selma's services. The questions asked by respondent's attorney of witness Krosning are as follows:

"Mr. Krosning: Now, then, your mother had considerable cash in a dresser drawer in the dining room of the Wood Street property, did she not? Mr. Schnitzer (attorney for claimant): I object, Your Honor. The Court: Read the question. (Whereupon question read.) The Court: Objection sustained. *** Mr. Wachowski: Did your mother have access

to this drawer, the dresser drawer in the dining room? Mr. Schusterman: I will object to that. The Court: Objection sustained." The court also sustained an objection to a similar question propounded to respondent as follows: "Q. Your mother had considerable amount of cash in a dresser drawer in the Wood Street property? Mr. Schusterman: I object. The Court: Sustained. Mr. Wachowski: That's all." It is urged that on the authority of Gray v. Stein, 221 Ill. App. 437, the exclusion of this evidence constituted reversible error. In the Stein case it was admitted by the respective parties that during the lifetime of decedent claimant received from him \$50.00 on account, and that during the period of the claim decedent paid the claimant other sums of money from time to time. Upon trial the respondent offered proof to show that the deceased was financially able to pay his debts, and that he was prompt in the payment of his obligations. The court refused to permit this proof when offered, but later allowed respondent to introduce proof as to decedent's ability to pay his debts, refusing, however, to admit proof as to his promptness in meeting his obligations. The court held that this constituted error. In the case at bar no offer of proof was made. Respondent relies entirely upon the questions propounded to Arthur Kroening and to the respondent. The question asked Arthur Kroening was too general to be considered an offer of proof. Respondent's attorney asked the witness: "Now then, your mother had considerable cash in a dresser drawer in the dining room of the Wood Street property, did she not?" This question does not indicate any period of time during which this cash may have been contained in the dresser drawer, nor does it specify any amount. Moreover, the question does not in anywise deal with the decedent's habit of paying her bills promptly or otherwise. If it was respondent's con-

to this drawer, the dresser drawer in the dining room? Mr. Schusterman: I will object to that. The Court: Objection sustained. The court also sustained an objection to a similar question propounded to respondent as follows: "Q. Your mother had considerable amount of cash in a dresser drawer in the Wood Street property? Mr. Schusterman: I object. The Court: Sustained. A. R. Schusterman: That's all. - It is urged that on the authority of Gray v. Stein, 221 Ill. App. 437, the exclusion of this evidence constituted reversible error. In the Gray case it was admitted by the respective parties that during the lifetime of decedent claimant received from him \$50.00 on account, and that during the period of the claim decedent paid the claimant other sums of money from time to time. Upon trial the respondent offered proof to show that the deceased was financially able to pay his debts, and that he was prompt in the payment of his obligations. The court refused to permit this proof when offered, but later allowed respondent to introduce proof as to decedent's ability to pay his debts, refusing, however, to admit proof as to his promptness in meeting his obligations. The court held that this constituted error. In the case at bar no offer of proof was made. Respondent relies entirely upon the questions propounded to Arthur Kucening and to the respondent. The question asked Arthur Kucening was too general to be considered an offer of proof. Respondent's attorney asked the witness: "Now then, your mother had considerable cash in a dresser drawer in the dining room of the Wood Street property, did she not?" This question does not indicate any period of time during which this cash may have been contained in the dresser drawer, nor does it specify any amount. Moreover, the question does not in anywise deal with the decedent's habit of paying her bills promptly or otherwise. If it was respondent's com-

tention that the deceased had at all times during the ten-year period sufficient cash in the ~~dresser~~ drawer with which to pay for Selma's services, and that she was in the habit of paying her obligations promptly, it was incumbent upon respondent to offer to prove such facts in sufficient detail to support the presumption of payment; but in the form that these questions were put to the witnesses, we think the objection of claimant's counsel was properly sustained.

From a careful examination of the record we are convinced that Selma Kroening had a bona fide claim against the estate of her deceased mother, and that the amount awarded was fair and reasonable. The judgment of the Circuit court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

testimony that the deceased had at all times during the ten-year period sufficient cash in the dresser drawer with which to pay for John's services, and that she was in the habit of paying her collections promptly, it was incumbent upon respondent to offer to prove such facts in sufficient detail to support the prescription of payment; but in the form that these questions were put to the witnesses, we think the objection of claimant's counsel was properly sustained.

From a careful examination of the record we are convinced that John's testimony was a bona fide claim against the estate of her deceased father, and that the amount awarded was fair and reasonable. The judgment of the Circuit Court is therefore affirmed.

JUDGE JOHN W. BROWN.

Scanlan and Sullivan, JJ., concur.

43502

329 I.A. 178²

JOHN F. McDONOUGH, a minor, by
MARTIN McDONOUGH, his father
and next friend,

Appellant,

v.

FRED SCHWARTZ,

Appellee.

}
} APPEAL FROM CIRCUIT
} COURT, COOK COUNTY.
}
} 366

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered pursuant to a directed verdict in favor of defendant at the close of plaintiff's case.

It appears that on July 9, 1942 the defendant, Fred Schwartz, while driving his Buick automobile in a northerly direction on Orchard street in Chicago between 9:00 and 9:30 in the evening, came to a stop with a flat tire at the southeast intersection of Schubert avenue. The plaintiff, John F. McDonough, then 14 years of age, who resided across the street, joined a group of children who were standing near the car. At Schwartz' request, McDonough assisted Schwartz in changing the tire. Schwartz placed the jack under the right rear bumper, and while McDonough held the wheel so that it would not revolve, Schwartz unloosened the nuts, removed the wheel, and placed it against the curb. He then raised the lid of the rear compartment and asked McDonough to hold the spare wheel, which was lying under the lid inside the compartment. While McDonough was bent over with his head under the lid, Schwartz stood beside him, also with his head under the lid, moving his hands around in the compartment and leaning against the rear bumper. The car fell off the jack, and the compartment lid struck McDonough on the head, causing a laceration of the scalp and a cerebral concussion. After receiving first aid at the hospital he was confined to his bed for several days, during which he suffered

8281A.118

43702

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

JOHN F. McDONOUGH, a minor, by
BETWEEN McDONOUGH, his father
and next friend,
Appellant,
v.
EDWARD SCHWARTZ,
Appellee.

MR. PRESIDING JUSTICE (READING) DELIVERED THE OPINION OF THE COURT.
Plaintiff appeals from a judgment entered pursuant to
a directed verdict in favor of defendant at the close of plain-
tiff's case.

It appears that on July 9, 1942 the defendant, Fred
Schwartz, while driving his Buick automobile in a northerly
direction on Grand street in Chicago between 9:00 and 9:30
in the evening, came to a stop with a flat tire at the
southeast intersection of Hubbard avenue. The plaintiff,
John F. McDonough, then 14 years of age, who resided across
the street, joined a group of children who were standing
near the car. At Schwartz' request, McDonough assisted
Schwartz in changing the tire. Schwartz placed the jack
under the right rear bumper, and while McDonough held the
wheel so that it would not revolve, Schwartz unloosed the
nuts, removed the wheel, and placed it against the curb.
He then raised the lid of the rear compartment and asked
McDonough to hold the spare wheel, which was lying under the
lid inside the compartment. While McDonough was bent over
with his head under the lid, Schwartz stood beside him, also
with his head under the lid, moving his hands around in the
compartment and leaning against the rear bumper. The car
fell off the jack, and the compartment lid struck McDonough
on the head, causing a laceration of the scalp and a cerebral
concussion. After receiving first aid at the hospital he was
confined to his bed for several days, during which he suffered

from dizzy spells. During one of these spells he arose from his bed, fell and sustained a fractured leg.

In his suit for damages resulting from the accident plaintiff charged general negligence, and upon the trial adduced the foregoing evidence, which is undisputed. After the accident his father and mother talked to Schwartz, both at the scene of the accident and while plaintiff was being given first aid at the hospital. Both his father and mother testified that Schwartz was drunk.

The case was presented on the theory that the doctrine of res ipsa loquitur applied to the facts. It was defendant's contention that the doctrine did not apply, and the court was evidently also of that opinion; and since no specific negligence was charged and no evidence of specific negligence adduced upon the hearing, the court directed a verdict at the close of plaintiff's case. We think the court was in error in so doing. The theory and the elements necessary for invoking the doctrine of res ipsa loquitur are too well known to require extended discussion. Defendant's principal contention, and the view evidently adopted by the court in ruling on the motion for a directed verdict, is that defendant was not in the exclusive control of the instrumentality which caused the injury, and that plaintiff failed to prove that "the accident is one that except for negligence of defendant would not ordinarily have happened." (Wm. Wrigley, Jr. Co. v. Standard Roofing Co., 325 Ill. App. 210). In addition to the undisputed facts hereinbefore set forth, it appears that no blocks were placed under any of the wheels. Plaintiff testified that he did not push on the spare tire, wiggle it or use any pressure whatsoever. There is no evidence as to whether the brakes had been set. Under the circumstances, there is no evidence as to what caused the lid of the trunk to fall on plaintiff's head. It may have been due to a defective

from dizzy spells. During one of these spells he arose from his bed, fell and sustained a fractured leg.

In his suit for damages resulting from the accident plaintiff charged general negligence, and upon the trial adduced the foregoing evidence, which is undisputed. After the accident his father and mother talked to Schwartz, both at the scene of the accident and while plaintiff was being given first aid at the hospital. Both his father and mother testified that Schwartz was drunk.

The case was presented on the theory that the doctrine of res ipsa loquitor applied to the facts. It was defendant's contention that the doctrine did not apply, and the court was evidently also of that opinion; and since no specific negligence was charged and no evidence of specific negligence adduced upon the hearing, the court directed a verdict at the close of plaintiff's case. We think the court was in error in so doing. The theory and the elements necessary for invoking the doctrine of res ipsa loquitor are too well known to require extended discussion. Defendant's principal contention, and the view evidently adopted by the court in ruling on the motion for a directed verdict, is that defendant was not in the exclusive control of the instrumentality which caused the injury, and that plaintiff failed to prove that "the accident is one that except for negligence of defendant would not ordinarily have happened." (W. Wiley, Jr. Co. v. Standard Tooling Co., 327 Ill. App. 210.) In addition to the undisputed facts heretofore set forth, it appears that no blocks were placed under any of the wheels. Plaintiff testified that he did not push on the spare tire, while it or use any pressure whatsoever. There is no evidence as to whether the blocks had been set. Under the circumstances there is no evidence as to what caused the lid of the truck to fall on plaintiff's head. It may have been due to a defective

mechanism in the lid of the trunk, to an improper job in jacking up the car, to defendant's failure to block the wheels of the car so as to keep it from moving in either direction, to the pressure which defendant exerted against the car while leaning on the bumper while he was working in the compartment under the open lid, or to a combination of any of these circumstances. All these instrumentalities were in the exclusive control of defendant. Plaintiff was merely an innocent bystander, a boy of 14 years of age, assisting defendant at his request and working under his specific instructions, and under the doctrine of res ipsa loquitur it was certainly incumbent upon defendant to offer some explanation, if he could, in rebuttal of the presumption which arises under the doctrine. Defendant did not even testify on the hearing, and under the facts presented we are of the opinion that it was error for the court to rule that the doctrine of res ipsa loquitur did not apply, and to direct a verdict for defendant. The judgment of the Circuit court is therefore reversed, and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Scanlan and Sullivan, JJ., concur.

mechanism in the fall of the truck, to an improper job in
taking up the car, to defendant's failure to block the
wheels of the car so as to keep it from moving in either
direction, to the pressure which defendant exerted against
the car while leaning on the bumper while he was working in
the compartment under the open lid, or to a combination of
any of these circumstances. All these instrumentalities
were in the exclusive control of defendant. Plainly it was
merely an innocent bystander, a boy of 14 years of age,
assisting defendant at his request and working under his
specific instructions, and under the doctrine of res ipsa
loquens it was certainly incumbent upon defendant to offer
some explanation, if he could, in rebuttal of the presumption
which arises under the doctrine. Defendant did not even
testify on the hearing, and under the facts presented we are
of the opinion that it was error for the court to rule that
the doctrine of res ipsa loquens did not apply, and to
direct a verdict for defendant. The judgment of the Circuit
court is therefore reversed, and the cause remanded for a new
trial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Benjamin and Sullivan, JJ., concur.

43519

329 I.A. 179

JOSEPH P. ROGERS and LA VERNE ROGERS,
Appellants,

v.

GENEVIEVE TRUDZINSKI, TOM KORZEVICH,
MRS. TOM KORZEVICH, MARY ROE and
JOHN DOE,

Appellees.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action of replevin in the Municipal court against Genevieve Trudzinski and others to recover possession of certain household furniture. A writ of replevin having been issued, the bailiff recovered the property from defendant Genevieve Trudzinski and delivered it to plaintiffs. Subsequently the cause was tried by the court without a jury, resulting in a finding and judgment awarding possession of the property to defendant Genevieve Trudzinski and an order that a writ of retorno habendo issue for the return of the property to her. Plaintiffs have taken an appeal from that order.

Plaintiffs have utterly failed to comply with the provisions of rule 7 of the Appellate court; they do not summarize the facts as disclosed by the report of proceedings, nor state any facts which would give the court the information necessary to an understanding of the case. We have therefore been obliged to rely on the statement of facts contained in defendants' brief and an examination of the abstract of record to ascertain the background of the litigation.

It appears that Genevieve and Stanley Trudzinski were married on October 23, 1943, and thereafter lived together in an apartment at 5106 North Newland avenue. The household furniture, which is the subject matter of this replevin suit, was purchased after Christmas in 1943 and was delivered to their home. In the late summer of 1944 a child was born as a result of their marriage. Subsequently, on August 17, 1944, Stanley Trudzinski beat and

• 7

.000107

[illegible]

assaulted his wife at their home. She became ill the following day and was carried out of her home by her father to her parents' place of residence. None of the furniture nor any of her clothing or personal effects were removed at the time. Her husband thereafter stayed with his mother, Johanna Trudzinski, at her home until December 16, 1944. In the interim between August 17 and December 16 the Trudzinski apartment was vacant and unoccupied. In September 1944 Genevieve filed suit for divorce against her husband in the Superior court, but on December 16, 1944 they effected a reconciliation, and she went back to live with him on Newland avenue. Upon her return she found the premises exactly as she had left them on August 16. None of the personal property had been removed. The parties then lived together until February 21, 1945, when they again separated, but on that occasion Genevieve took the furniture with her.

Stanley Trudzinski testified upon the hearing that his mother owned and had paid for the furniture; that he sold the furniture to his sister and her husband, La Verne and Joseph P. Rogers, the plaintiffs, on August 17, 1944 for \$1000 and gave them a bill of sale therefor, which was introduced as an exhibit; that they paid him \$1000 cash, which he turned over to his mother; that he gave no receipt for the \$1000 to his sister and brother-in-law, and received no receipt from his mother therefor; that on August 17, 1944 the Rogers entered into a lease, with him as lessee, for the apartment on Newland avenue, with the furniture in question, for a thirteen-month period beginning September 1, 1944 at a rental of \$50 a month, which lease was also introduced as an exhibit; and that his sister, La Verne Rogers, was in possession of the apartment from August 17 to December 16.

Johanna Trudzinski testified that prior to August 17,

assaulted his wife at their home. The police all the following day and was carried out of her home by her father to her parents' place of residence. None of the furniture nor any of her clothing or personal effects were removed at the time. Her husband thereafter stayed with his mother, Johannes Truelsen, at her home until December 10, 1944. In the interim between August 17 and December 10 the Truelsen apartment was vacant and unoccupied. In September 1944 Genevieve filed suit for divorce against her husband in the Superior Court, but on December 10, 1944 they effected a reconciliation, and she went back to live with him on Newland Avenue. Upon her return she found the premises exactly as she had left them on August 10. None of the personal property had been removed. The parties then lived together until February 1, 1945, when they again separated, but on that occasion Genevieve took the furniture with her.

Stanley Truelsen testified upon the hearing that his mother owned and had paid for the furniture; that he sold the furniture to his sister and her husband, La Verne and Joseph P. Rogers, the plaintiffs, on August 17, 1944 for \$1000 and gave them a bill of sale therefor, which was introduced as an exhibit; that they paid him \$1000 cash, which he turned over to his mother; that he gave no receipt for the \$1000 to his sister and brother-in-law, and received no receipt from his mother therefor; that on August 17, 1944 the Rogers entered into a lease, with him as lessor, for the apartment on Newland Avenue, with the furniture in question, for a fifteen-month period beginning September 1, 1944 at a rental of \$70 a month, which lease was also introduced as an exhibit; and that his sister, La Verne Rogers, was in possession of the apartment from August 17 to December 10.

Johannes Truelsen testified that prior to August 17,

1944 she bought the furniture and paid for it, but that she did not give it to her son Stanley. La Verne Rogers testified that she bought the furniture from her brother Stanley on August 17, 1944 for \$1000 cash and received a bill of sale from him; that on the same day she leased to him the apartment on Newland avenue for \$50 a month, including the use of the furniture; that her mother originally paid for the furniture; and that she (La Verne Rogers) collected rent from Stanley every month from September 1944.

The defendant Genevieve Trudzinski testified that prior to her marriage she earned \$60 per week; that she sold property formerly owned by her on New England avenue for \$2300, so that at the time of her marriage she had accumulated the sum of \$4500; that shortly after Christmas 1943 she purchased the furniture in question for \$1100 and paid for it with her own funds, receiving invoices from several furniture companies; and that her husband Stanley was with her when she made the purchases. She denied that Stanley's mother paid for the furniture, and stated that Stanley never told her that he sold the furniture to his sister La Verne Rogers on August 17, 1944 or that she leased the premises on Newland avenue to him; and she denied that any rent was paid to her sister-in-law for the premises from August 17 to December 16, 1944.

The replevin suit to recover the possession of the furniture which Genevieve took from her home on February 21, 1945 was filed in the Municipal court on March 26, 1945.

Plaintiffs make six separate points in their brief which are scantily argued in less than two pages. So far as we are able to determine, the principal grounds urged for reversal are: (1) that the "pleadings present no point raised, except that defendants have failed to file any pleadings whatsoever"; (2) that defendants did not introduce any "affirmative" or

1944 she bought the furniture and paid for it, but that she did not give it to her brother Stanley. In Verne Rogers testified that she bought the furniture from her brother Stanley on August 17, 1944 for \$1000 cash and received a bill of sale from him; that on the same day she leased to him the apartment on Newland Avenue for \$50 a month, including the use of the furniture; that her mother originally paid for the furniture; and that she (La Verne Rogers) collected rent from Stanley every month from September 1944.

The defendant Genevieve Lindanski testified that prior to her marriage she earned \$60 per week; that she sold property formerly owned by her on Newland Avenue for \$300, so that at the time of her marriage she had accumulated the sum of \$400; that shortly after Christmas 1943 she purchased the furniture in question for \$1100 and paid for it with her own funds, receiving invoices from several furniture companies; and that her husband Stanley was with her when she made the purchases. She denied that Stanley's mother paid for the furniture, and stated that Stanley never told her that he sold the furniture to his sister La Verne Rogers on August 17, 1944 or that she leased the premises on Newland Avenue to him; and she denied that any rent was paid to her sister-in-law for the premises from August 17 to December 16, 1944.

The reply in suit to recover the possession of the furniture which Genevieve took from her home on February 21, 1945 was filed in the Municipal Court on March 26, 1945.

Plaintiffs make six separate points in their brief which are essentially argued in less than two pages. So far as we are able to determine, the principal grounds urged for reversal are: (1) that the "pleadings" present no point raised, except that defendants have failed to file any pleadings whatsoever; (2) that defendants did not introduce any "affirmative" or

"formal" defense; and (3) that the final judgment order is invalid because the trial judge, within the term, amended the judgment so as to conform with his findings, and ordered that a writ of retorno habendo issue for the return of the property.

With respect to the first contention it appears that defendants filed an appearance and written interrogatories, but no answer. No point was made in the court below of the failure of defendants to file an answer, and therefore that question cannot be raised for the first time on appeal.

Quinlan & Tyson, Inc. v. National Casualty Co., 311 Ill. App. 369; Fraser v. Glass, 311 Ill. App. 336; and Skinner v. Glos, 274 Ill. 58. Moreover, any such defect would be cured by the judgment. Ill. Rev. Stat. 1945, ch. 7, par. 6, sec. 6 (5th).

As to the second ground urged for reversal, we find that counsel for defendants moved for a finding in their favor at the close of plaintiffs' case. Thereafter the defendant Genevieve Trudzinski testified as a witness in her own behalf, and was cross-examined by plaintiffs' counsel. Previously she had been called by plaintiffs and cross-examined as an adverse witness, and was re-examined by her own attorney. We have already stated the substance of her testimony to the effect that she originally purchased the furniture with her own funds, and was therefore entitled to the possession thereof. In the course of the proceeding the trial court called her as the court's witness, without any objection on the part of plaintiffs' counsel, for the purpose of ascertaining the facts heretofore related. Upon this state of the record we do not understand the contention that the defendant Genevieve Trudzinski failed to interpose an affirmative defense. Her defense was that she bought and owned the furniture which was sought to be replevied; that the sale of the furniture and the lease

"former" of course; and that the trial judge's order is invalid because the trial judge, within the term, awarded the judgment so as to conform with his findings, and ordered that a writ of habeas corpus issue for the return of the property.

With respect to the first contention it appears that defendants filed an appearance and written interrogatories, but no answer. No point was made in the court below of the failure of defendants to file an answer, and therefore that question cannot be raised for the first time on appeal.

Camlin v. Tyson, Inc. v. National Cash Co., 311 Ill. App. 309; Trapp v. Glass, 311 Ill. App. 336; and Trapp v. Glass, 314 Ill. App. 30. Moreover, any point that would be raised by the judgment, Ill. Rev. Stat. 194, c. 1, par. 6, sec. 6 (5th).

As to the second ground urged for reversal, we find that counsel for defendants moved for a finding in their favor at the close of plaintiffs' case. Thereafter the defendant Genevieve Trandahl testified as a witness in her own behalf, and was cross-examined by plaintiffs' counsel. Previously she had been called by plaintiffs and cross-examined as an adverse witness, and was re-examined by her own attorney. We have already stated the substance of her testimony to the effect that she originally purchased the furniture with her own funds, and was therefore entitled to the possession thereof. In the course of the proceeding the trial court called her as the court's witness, without any objection on the part of plaintiffs' counsel, for the purpose of ascertaining the facts heretofore stated. Upon this state of the record we do not understand the contention that the defendant Genevieve Trandahl failed to introduce an affirmative defense. Her defense was that she bought and owned the furniture which was sought to be recovered; that the sale of the furniture and the lease

of the premises, including the furniture, were not bona fide; and that that transaction was merely an attempt to defeat her right to the furniture. The following version of the transaction, as testified to by plaintiff and her witnesses, amply supports the court's conclusion that the furniture belonged to Genevieve Trudzinski and that she was entitled to the possession thereof: (1) the alleged sale of the furniture was from Stanley Trudzinski to his sister La Verne Rogers; (2) La Verne Rogers bought the furniture, not for her own use but for Stanley's use, and Stanley, the seller, retained possession of the property; (3) the sale was made on the same day that Stanley's wife separated from him; (4) Stanley paid rent to his sister for the furniture, although he did not use it; (5) Stanley paid rent to his sister for the apartment although it was not occupied by him; (6) Stanley paid his sister rent for the apartment from August 17 to December 16, 1944 although she was in possession thereof during that period; and (7) the sale was reduced to writing, but payment of the \$1000 was not evidenced by any receipt. There is considerable force to the argument that it would "do violence to ordinary credulity to assert that the transaction between Stanley and his sister was real and genuine."

The remaining contention relates to the validity of the judgment. The report of proceedings discloses that on April 27, 1945, upon the trial of the cause and at the conclusion of all the evidence, the trial court announced his finding as follows: "The Court will hold that the sister [plaintiff] is not entitled to this furniture as against the wife [defendant]. Finding for the defendant. Appeal thirty days. The Court finds that the sister has not the proper title for these goods as against the defendant, Genevieve Trudzinski." However, the clerk in spreading the finding of record, entered an order

of the premises, including the furniture, were not bona fide; and that that transaction was merely an attempt to defeat her right to the furniture. The following version of the transaction, as testified to by Plaintiff and her witnesses, fully supports the court's conclusion that the furniture belonged to Bernavie Tundakinski and that she was entitled to the possession thereof: (1) the alleged sale of the furniture was from Stanley Tundakinski to his sister-in-law, Verne Rogers; (2) Verne Rogers bought the furniture, not for her own use but for Stanley's use, and Stanley, the seller, retained possession of the property; (3) the sale was made on the same day that Stanley's wife separated from him; (4) Stanley paid rent to his sister for the furniture, although he did not use it; (5) Stanley paid rent to his sister for the apartment although it was not occupied by him; (6) Stanley paid his sister rent for the apartment from August 17 to December 16, 1944 although she was in possession thereof during that period; and (7) the sale was reduced to writing, but payment of the \$1000 was not evidenced by any receipt. There is considerable force to the argument that it would be violence to ordinary credibility to assert that the transaction between Stanley and his sister was real and genuine.

The remaining contention relates to the validity of the judgment. The report of proceedings discloses that on April 27, 1944, upon the trial of the cause and at the conclusion of all the evidence, the trial court announced his finding as follows: "The Court will hold that the sister [Plaintiff] is not entitled to this furniture as against the wife [defendant]. Finding for the defendant. Appeal thirty days. The Court finds that the sister has not the proper title for these goods as against the defendant, Bernavie Tundakinski." However, the clerk in preparing the finding of record, entered an order

that day finding the issues against the plaintiff. Subsequently, on May 1, 1945, four days later, the trial court entered an order vacating the order of April 27, finding that the right to possession of the property replevied was "Not in the Plaintiff," and ordering that the defendant Genevieve Trudzinski recover possession of the property from plaintiffs and that a writ of retorno habendo issue for the return of the property. It is obvious that the error committed in the entry of the order of April 27 was purely a clerical mistake, because the court's finding did not warrant any such entry. The order should have directed the return of the property to the defendant in the first instance. Chap. 119, par. 22, sec. 22, Ill. Rev. Stat. 1945 provides that if the right of property is adjudged against the plaintiff, the judgment should be given for the return of the property if such property has been delivered to the plaintiff, and our courts have construed this section of the statute to mean that if the court or jury finds the issue for the defendant in a replevin suit, he is entitled to a return of the property. Rohe v. Pease, 189 Ill. 207; Underwood v. White, 45 Ill. 437, and Holmes v. Tarble, 77 Ill. App. 114. Nor was it necessary that notice should be served upon the parties before the error of the clerk was rectified by the proper order of May 1. All the parties were present in court on April 27 when the trial judge made his finding, and the order of May 1 confirmed legally the finding of the court announced on April 27. Only four days intervened between the trial of the case and the entry of the order on May 1. The principle is well established in this state that a court has control over its own judgment, records and orders, and has the power and right to correct apparent clerical mistakes or misprisions in them so as to speak the truth. People v.

that day finding the law on the plaintiff's side. Subsequently, on May 1, 1937, four days later, the trial court entered an order vacating the order of April 27, finding that the right to possession of the property relieved was "not in the plaintiff," and ordering that the defendant should have recovered possession of the property from the plaintiff and that a writ of replevin should issue for the return of the property. It is obvious that the error committed in the entry of the order of April 27 was purely a clerical mistake, because the court's finding did not warrant any such entry. The order should have directed the return of the property to the defendant in the first instance. Chap. 119, par. 22, sec. 22, Ill. Rev. Stat. 1937 provided that if the right of property is adjudged against the plaintiff, the judgment should be given for the return of the property if such property has been delivered to the plaintiff, and our courts have construed this section of the statute to mean that if the court or jury finds the issue for the defendant in a replevin suit, he is entitled to a return of the property. Bohn v. Bohn, 193 Ill. 207; Underwood v. White, 45 Ill. 437, and Holmes v. People, 77 Ill. App. 114. Nor was it necessary that notice should be served upon the parties before the error of the clerk was rectified by the proper order of May 1. All the parties were present in court on April 27 when the trial judge made his finding, and the order of May 1 confirmed legally the finding of the court announced on April 27. Only four days intervened between the trial of the case and the entry of the order on May 1. The principle is well established in this state that a court has control over its own judgment, records and orders, and has the power and right to correct apparent clerical mistakes or misstatements in them so as to speak the truth. People v.

Lyle, 329 Ill. 418; People v. Uschold, 257 Ill. App. 176;
and Sells v. Grand Trunk Western Ry. Co., 206 Ill. App.
45.

We find no convincing reason for reversal, and therefore the judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

-5-

Under the provisions of the Act, the Board of Directors of the National Bank of Commerce, New York, is authorized to issue bonds in the amount of \$1,000,000, and to use the same for the purpose of increasing the capital of the bank.

The Board of Directors of the National Bank of Commerce, New York, is authorized to issue bonds in the amount of \$1,000,000, and to use the same for the purpose of increasing the capital of the bank.

Respectfully,
J. P. Morgan & Co.,
New York.

43563

329 I.A. 180¹

MYRON LEVIN, a minor, by MAURICE
LEVIN, his father and next friend,
Appellant,

v.

LAUTERBACH COAL AND ICE COMPANY, a
corporation, and THOMAS J. FRIEL
and CHARLES C. RENSHAW, as Trustees,
etc., et al., doing business as
CHICAGO SURFACE LINES,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

369

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On the afternoon of February 7, 1944 plaintiff, a minor 13 years of age, attending Austin High School, accompanied by his friend, Burton Altman, alighted with other passengers from an electric bus operated by the defendants doing business as Chicago Surface Lines on Central avenue at its intersection with Harrison street in Chicago, intending to transfer to a Harrison street car owned and operated by said Chicago Surface Lines, and while crossing Central avenue at the north crosswalk of Harrison street from west to east in front of the bus he had to accelerate his pace to avert being struck by the bus, as he claims, because it started forward before he had cleared its path, and thereby came in contact with a southbound motor truck owned and operated by defendant Lauterbach Coal and Ice Company. The truck ran over his right foot and ankle, causing injuries so severe as to necessitate several operations and many weeks of hospitalization, ultimately resulting in the shortening of his injured leg, malposition of his foot, destruction of the tendons, loss of function of the toe and ankle joints, severe scars and other deformities which became permanent conditions. The attending physician's bill for services was \$2200, in addition to which there were hospital and nurses' bills and other expenses approximating more than \$1700. His suit against the

3221.A.10

LYNN, a minor, by LAMAR, his father and next friend, appellant.

v.

LAUTERBACH COAL AND ICE COMPANY, a corporation, and THOMAS J. LAINE, and CHARLES C. LAINE, as trustees, etc., et al., doing business as CHICAGO BUTRACE LINES, appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE PRINCE delivered the opinion of the court.

On the afternoon of February 7, 1944 plaintiff, a minor 13 years of age, attending Austin High School, accompanied by his friend, Burton Altman, alighted with other passengers from an electric bus operated by the defendants doing business as Chicago Butrace Lines on Central Avenue at its intersection with Harrison Street in Chicago, intending to transfer to a Harrison Street car owned and operated by said Chicago Butrace Lines, and while crossing Central Avenue at the north crosswalk of Harrison Street from west to east in front of the bus he had to accelerate his pace to avert being struck by the bus, as he claims, because it started forward before he had cleared its path, and thereby came in contact with a southbound motor truck owned and operated by defendant Lauterbach Coal and Ice Company. The truck ran over his right foot and ankle, causing injuries so severe as to necessitate several operations and many weeks of hospitalization, ultimately resulting in the shortening of his injured leg, amputation of his foot, destruction of the tendons, loss of function of the toe and ankle joints, severe scars and other deformities which became permanent conditions. The attending physician's bill for services was \$2200, in addition to which there were hospital and nurses' bills and other expenses approximating more than \$1700. His suit against the

Chicago Surface Lines and Lauterbach Coal and Ice Company resulted in a verdict and judgment for defendants, from which plaintiff appeals.

In count I of his amended complaint he charges that while he was in the exercise of such care for his own safety reasonably to be expected of a child of his years, Lauterbach Coal and Ice Company drove its truck at a rate of speed that was dangerous and excessive, considering the condition of traffic and the use of the way, in violation of the statutes of the State of Illinois and the ordinances of the City of Chicago relating thereto; that it failed to slow down or stop its truck when danger to plaintiff was apparent; failed to sound the horn or to give other timely warning of the approach of the truck while plaintiff was on the crosswalk; failed to equip the truck with good and sufficient brakes and to maintain the brakes in good condition, in violation of the statutes and city ordinances; overtook and passed a standing bus within 100 feet of the intersection, in violation of the statutes and ordinances; overtook and passed a trolley bus within 10 feet thereof, in violation of the statutes and ordinances; and otherwise carelessly and negligently maintained and operated its truck.

In count II of his amended complaint plaintiff repeated the allegation with respect to the degree of care for his own safety expected of a child of his years, and charged that the Chicago Surface Lines operated its bus at the time and place in a careless and negligent manner in that it started up its bus while plaintiff was crossing in front thereof and while he was at all times in full view of the operator of the bus, and that as a direct and proximate result of the negligence and carelessness of the Chicago Surface Lines plaintiff was caused to

Chicago Surface Lines and Lauterbach Coal and Ice Company resulted in a verdict and judgment for defendants, from which plaintiff appeals.

In count I of his amended complaint he charges that while he was in the exercise of such care for his own safety reasonably to be expected of a child of his years, Lauterbach Coal and Ice Company drove its truck at a rate of speed that was dangerous and excessive, considering the condition of traffic and the use of the way, in violation of the statutes of the State of Illinois and the ordinances of the City of Chicago relating thereto; that it failed to slow down or stop its truck when danger to plaintiff was apparent; failed to sound the horn or to give other timely warning of the approach of the truck while plaintiff was on the crosswalk; failed to equip the truck with good and sufficient brakes and to maintain the brakes in good condition, in violation of the statutes and city ordinances; overtook and passed a standing bus within 100 feet of the intersection, in violation of the statutes and ordinances; overtook and passed a trolley bus within 10 feet thereof, in violation of the statutes and ordinances; and otherwise carelessly and negligently maintained and operated its truck.

In count II of his amended complaint plaintiff repeated the allegation with respect to the degree of care for his own safety expected of a child of his years, and charged that the Chicago Surface Lines operated its bus at the time and place in a careless and negligent manner in that it started up its bus while plaintiff was crossing in front thereof and while he was at all times in full view of the operator of the bus, and that as a direct and proximate result of the negligence and carelessness of the Chicago Surface Lines plaintiff was caused to

accelerate his pace to avert being struck by the bus and thereby came into the path of the southbound motor truck owned and operated by the Lauterbach Coal and Ice Company, and was then and there struck by said truck at the intersection.

In its answer the Lauterbach Coal and Ice Company denied that plaintiff was "in the exercise of ordinary care for his own safety" and averred, on the contrary, that he was guilty of negligence and carelessness which brought about his injuries, and denied the specific acts of negligence alleged in count I of the amended complaint. The Chicago Surface Lines in its answer to count II denied that plaintiff was in the exercise of due care for his own safety "or was in the exercise of such care for his own safety reasonably to be expected of a child of his years," denied that at the time of the occurrence plaintiff was a passenger of the Chicago Surface Lines, and that said defendant owed him the duty alleged in the amended complaint; denied that at the time and place in question its bus was operated in a negligent or careless manner and that it started up while plaintiff was crossing in front of said bus, "or started up at all, or that thereby plaintiff was caused to accelerate his pace, if at all," but alleged that "at all times in question said bus was standing, and that it remained at a standstill."

There is considerable conflict in the evidence, embraced within some 500 pages of the record, both with respect to the degree of care exercised by plaintiff after he alighted from the bus, and the charges of negligence against the respective defendants, but so much of the evidence as is necessary for a consideration of the issues involved may be summarized as follows. Plaintiff was the third or fourth passenger to alight from the

responder to his race to avoid being struck by the bus and thereby came into the path of the southbound motor truck owned and operated by the Lanthorn Coal and Ice Company, and was then and there struck by said truck at the intersection.

In its answer the Lanthorn Coal and Ice Company denied that plaintiff was "in the exercise of ordinary care for his own safety" and averred, on the contrary, that he was guilty of negligence and a recklessness which brought about his injuries, and denied the specific acts of negligence alleged in count I of the amended complaint. The Chicago Surface Lines in its answer to count II denied that plaintiff was in the exercise of due care for his own safety "or was in the exercise of such care for his own safety responsibly to be expected of a child of his years," denied that at the time of the occurrence plaintiff was a passenger of the Chicago Surface Lines, and that said defendant owed him the duty alleged in the amended complaint; denied that at the time and place in question its bus was operated in a negligent or careless manner and that it started up while plaintiff was crossing in front of said bus, "or started up at all, or that thereby plaintiff was caused to accelerate his pace, if at all," but alleged that "at all times in question said bus was standing, and that it remained at a standstill."

There is considerable conflict in the evidence embraced within some 700 pages of the record, both with respect to the degree of care exercised by plaintiff after he alighted from the bus, and the charges of negligence against the respective defendants, but so much of the evidence as is necessary for a consideration of the issues involved may be summarized as follows: Plaintiff was the third or fourth passenger to alight from the

front of the bus, getting off ahead of his friend, Burton Altman. He testified that he stepped onto the curb and looked at the traffic light on the northwest corner, which was red for north and south traffic; that he then stepped off the curb and started to walk east in front of the bus on the north crosswalk; that at the time the signal on the northeast corner near the gas station showed green for east and west, as he noticed it; that as he reached a point about three feet from the east side of the bus the signal light changed from green to amber; that at that point the bus started to move toward him, and when it did he hurried a little, clearing the bus about a foot or so; that at the time he noticed a couple of cars pass, going east; that he then looked to his left and saw the truck about a foot or two from him; that he tried to step back but the front of the truck hit the left side of his body; that he was twirled around, and then the back wheel of the truck ran over his right foot, throwing him to the ground. On cross-examination he stated that the people who alighted from the bus ahead of him, crossed the street in safety; that after he left the curb he was about three feet in front of the bus; that as he was walking across the street the traffic lights began to change from green for east and west to amber; and that the bus started to move about a foot or so just at that time.

Burton Altman was about the same age as plaintiff. He testified that they had been at school and stopped at the school store for a soda to celebrate their first week at high school; that they boarded a Central avenue feeder bus at West End avenue going south; that the bus stopped at Harrison street just before the traffic-light pole on the northwest corner, right on the crosswalk line; that plaintiff and some other passengers got out before him, including a middle-aged woman

front of the bus, getting off ahead of his trunk, Burton

Alman. He testified that he stepped onto the curb and looked at the traffic light on the northwest corner, which was red for north and south traffic; that he then stepped off the curb and started to walk east in front of the bus on the north crosswalk; that at the time the signal on the northeast corner near the gas station showed green for east and west, as he noticed it; that as he reached a point about three feet from the east side of the bus the signal light

changed from green to amber; that at that point the bus started to move toward him, and when it did he hurried a little, clearing the bus about a foot or so; that at the time he noticed a couple of cars pass, going east; that he then looked to his left and saw the truck about a foot or two from him; that he tried to step back but the front of the truck hit the left side of his body; that he was twisted

around, and then the back wheel of the truck ran over his right foot, throwing him to the ground. On cross-examination he stated that the people who alighted from the bus ahead of

him, crossed the street in safety; that after he left the curb he was about three feet in front of the bus; that as he was walking across the street the traffic lights began to change from green for east and west to amber; and that the bus started to move about a foot or so past at that time.

Burton Alman was about the same age as plaintiff. He

testified that they had been at school and stopped at the school store for a soda to celebrate their first week at high school; that they boarded a Central Avenue feeder bus at West End Avenue going south; that the bus stopped at Harrison street just before the traffic-light pole on the northwest corner,

right on the crosswalk line; that plaintiff and some other passengers got out before him, including a middle-aged woman

whom he remembered; and that he (Altman) was the last to alight. He further testified that when plaintiff got off he looked at the lights and started to cross; that when he (Altman) got off the bus, plaintiff was in front of the bus and that he (Altman) was standing at the curb; that other people were crossing over Central avenue, going east, in front of plaintiff; that at the time plaintiff was just a little past the bus, the traffic lights at the northeast corner were green, then the lights were starting to turn to amber, and a woman standing alongside Altman pulled him back to her until the light changed; that as she held him he turned to his right and saw the woman, then looked in front and saw plaintiff twirled around; ~~that~~ the end of the truck hit him and the back end of it ran over his foot; that the truck stopped between a church and the Loretta Hospital, about 95 feet from the north crosswalk, where plaintiff was struck.

Fred Adler, a police officer attached to the accident prevention bureau, testified that he and his partner, Michael Reagan, investigated the accident, taking a statement from Altman, and that they made a brake test of the truck which they included in their report of the accident; that the truck involved was a 1936 Sterling, with a 9000-pound capacity; that the test performed on the truck to ascertain the efficiency of the brakes involved measuring the distance from the point where the brakes were applied, to the point where the truck stopped; and that the test showed that at a speed of 20 miles an hour, it took the truck 40 feet to stop. Plaintiff then attempted to prove by a series of questions what the standard stopping distance was for such a truck at the designated speed, so as to determine the condition of the foot brakes on this particular truck, but the court sustained defendant's objection, and the evidence was excluded. However, on cross-examination

when he remembered; and that he (Altman) was the last to
alight. He further testified that when Plaintiff got off
he looked at the lights and started to cross; that when he
(Altman) got off the bus, Plaintiff was in front of the bus
and that he (Altman) was standing at the curb; that other
people were crossing over Central Avenue, going east, in
front of Plaintiff; that at the time Plaintiff was just a
little past the bus, the traffic lights at the northeast
corner were green, then the lights were starting to turn to
amber, and a woman standing alongside Altman pulled him back
to her until the light changed; that as she held him he turned
to his right and saw the woman, then looked in front and saw
Plaintiff twisted around; that the end of the truck hit him
and the back end of it ran over his foot; that the truck
stopped between a church and the Everett Hospital, about 25
feet from the north crosswalk, where Plaintiff was struck.
Fred Altman, a police officer attached to the accident
prevention bureau, testified that he and his partner, Michael
Reagan, investigated the accident, taking a statement from
Altman, and that they made a brake test of the truck which
they included in their report of the accident; that the truck
involved was a 1936 Sterling, with a 2000-pound capacity; that
the test performed on the truck to ascertain the efficiency
of the brakes involved measuring the distance from the point
where the brakes were applied, to the point where the truck
stopped; and that the test showed that at a speed of 20 miles
an hour, it took the truck 40 feet to stop. Plaintiff then
attempted to prove by a series of questions what the standard
stopping distance was for such a truck at the designated speed,
so as to determine the condition of the foot brakes on this
particular truck, but the court sustained defendant's objection,
and the evidence was excluded. However, on cross-examination

Adler testified that he found "no other defect, other than the brakes."

William Schroeder, a chauffeur for the Lauterbach Coal and Ice Company, testified that he was traveling in the inner lane along Central avenue going south, and followed the Chicago Surface Lines bus from Jackson boulevard to Harrison street, a distance of about 600 feet, going approximately 15 miles per hour; that when the bus reached Harrison street it pulled over to the curb, and as it came to a stop the lights were green for Central avenue traffic; that he passed the bus on the left side, tooted his horn and kept going south; that when he got about eight or nine feet past the front end of the bus there was no other traffic besides the bus, no traffic ahead of him, nor any traffic going east or west; that he saw no pedestrians and did not see plaintiff before the accident; that the first thing that attracted his attention when he had passed the bus was that he heard something hit the side of the bus and scream; that he "stopped about fifteen feet in front of the street," left his truck and for the first time saw the boy as the bus driver was picking him up; that subsequently the police took him out for a brake test, after which the police officer told him that his "brakes weren't so good." Schroeder stated that he had tested the brakes at Western Scientific on January 7, and for a safety sticker on January 27 at a safety lane at Western Scientific. On cross-examination by counsel for the Chicago Surface Lines Schroeder testified that as the bus traveled down Central avenue it was straddling the lane that divides the southbound drives, and that as he proceeded behind the trolley bus, a little to the left thereof, he could see up ahead of the bus, which stopped at its regular stopping place; that he slowed

-5-

Adler testified that he found "no other defect, other than the brakes."

William Schneider, a chauffeur for the Lauterbach Coal and Ice Company, testified that he was traveling in the inner lane along Central Avenue going south, and followed the Chicago Surface Lines bus from Jackson Boulevard to Harrison Street, a distance of about 600 feet, going approximately 1 1/2 miles per hour; that when the bus reached Harrison Street it pulled over to the curb, and as it came to a stop the lights were green for Central Avenue traffic; that he passed the bus on the left side, tooted his horn and kept going south; that when he got about eight or nine feet past the front end of the bus there was no other traffic besides the bus, no traffic ahead of him, nor any traffic going east or west; that he saw no pedestrians and did not see plaintiff before the accident; that the first thing that attracted his attention when he had passed the bus was that he heard something hit the side of the bus and scream; that he "stopped about fifteen feet in front of the street," left his truck and for the first time saw the boy as the bus driver was picking him up; that subsequently the police took him out for a brake test, after which the police officer told him that his "brakes weren't so good." Schneider stated that he had tested the brakes at Western Scientific on January 7, and for a safety check on January 27 at a safety lane at Western Scientific. On cross-examination by counsel for the Chicago Surface Lines Schneider testified that as the bus traveled down Central Avenue it was straddling the lane that divides the southbound drives, and that as he proceeded behind the trolley bus, a little to the left thereof, he could see up ahead of the bus, which stopped at its regular stopping place; that he slowed

down to ten miles when he saw the bus swing over, and then started to pass the bus; that there were no people crossing in front of the bus when he honked his horn, and the bus was standing still as he passed it. On cross-examination by plaintiff's counsel, he stated that he sounded his horn because the bus stopped; that he knew it was discharging passengers, but did not know that school children were in the habit of getting off at that corner; that he knew there was a playground there, but not that there was a sign reading "Playground. Children crossing." He testified that he had passed this intersection hundreds of time before. He admitted that at a prior deposition he had answered that at the time of the brake test the policeman said to him, "Well, that ain't so hot," and that he replied, "Well, you are allowed twenty-five feet to stop, ain't you?" and that the policeman had answered, "Yes, but you took forty feet."

Charles Olson, a witness called on behalf of Lauterbach Coal and Ice Company, testified that he had a newspaper stand on the southeast corner of Central avenue and Harrison street, and saw the accident; that he was looking across the street at the people getting off the bus, and he observed two boys and a lady alighting; that "a young boy got off first, and at that time the lights were green for traffic on Central avenue"; that he observed a coal truck coming south behind the bus, with no other traffic on the street at that time; that "the boy who got off first jumped onto the sidewalk, ran around the bus, and ran across the street" when the lights were green for north and south traffic; that the truck was behind the bus and turned out a little to go ahead; that the second boy tried to run along Central avenue, but a lady getting off grabbed the second boy and held him back; that the first boy ran into the right side of the truck; that the feeder bus did not move at all;

down to ten o'clock when he saw the bus swing over, and then started to pass the bus; that there were no people crossing in front of the bus when he honked his horn, and the bus was waiting still as he passed it. On cross-examination by Plaintiff's counsel, he stated that he sounded his horn because the bus stopped; that he knew it was discharging passengers, but did not know that school children were in the habit of getting off at that corner; that he knew there was a playground there, but not that there was a sign reading "Playground, Children crossing." He testified that he had passed this intersection hundreds of times before. He admitted that at a prior deposition he had answered that at the time of the brake test the policeman said to him, "Well, that ain't so hot," and that he replied, "Well, you are allowed twenty-five feet to stop, ain't you?" and that the policeman had answered, "Yes, but you took forty feet."

Charles Olson, a witness called on behalf of Lauterbach Coal and Ice Company, testified that he had a newspaper stand on the southeast corner of Central Avenue and Harrison Street, and saw the accident; that he was looking across the street at the people getting off the bus, and he observed two boys and a lady standing; that a young boy got off first, and at that time the lights were green for traffic on Central Avenue; that he observed a coal truck coming south behind the bus, with no other traffic on the street at that time; that the boy who got off first jumped onto the sidewalk, ran around the bus, and ran across the street when the lights were green for north and south traffic; that the truck was behind the bus and turned out a little to go ahead; that the second boy tried to run along Central Avenue, but a lady getting off grabbed the second boy and held him back; that the first boy ran into the right side of the truck; that the driver bus did not move at all;

and that the truck came to a stop in the center of Harrison street, still facing south.

Walter Abraham, called as a witness on behalf of the Chicago Surface Lines, testified that he was the driver of the bus involved; that when he approached Harrison street, he had about 15 passengers; that when he was about 25 feet from Harrison street the lights were red; that as he slowed his bus and headed to a stop, the lights changed to green for north and south traffic; that after he stopped, people left through the rear and front doors; that plaintiff, who was the first to get off, ran around the stop light in a half circle in front of his bus and into the side of a coal truck going south; that as he saw him run, he looked in his rear-view mirror, noticed the truck, heard a horn and saw the boy come in contact with the right rear of the truck.

On cross-examination both plaintiff and his friend had testified that plaintiff did not run when crossing Central avenue, but accelerated his pace because, as plaintiff testified, the bus had started and he had to walk faster in order to clear it. When called for rebuttal, plaintiff testified that he did not hear a horn at any time before the occurrence.

We have narrated the foregoing evidence with respect to the salient facts in some detail to show that the material issues of fact and the proof relating thereto were close and conflicting, thus making it extremely important that the instructions to the jury be accurate, free of all error calculated to mislead the jury, and a correct statement of the law applicable to the issues involved. (McLaren v. Byrd, Inc., 296 Ill. App. 345; Lavander v. Chicago City Ry. Co., 296 Ill. 284; Stamas v. Waskow, 250 Ill. App. 364; Williams v. Pennsylvania Railroad Co., 235 Ill. App. 49; and Peters v. Madigan, 262 Ill. App. 417.) It is urged by plaintiff as the sole ground for reversal that in

and that the truck came to a stop in the center of Harrison street, still facing south.

Witness Abraham, called as a witness on behalf of the

Chicago Avenue lines, testified that he was the driver of

the bus involved; that when he approached Harrison street,

he had about 15 passengers; that when he was about 25 feet

from Harrison street the lights were red; that as he slowed

his bus and headed to a stop, the lights changed to green for

north and south traffic; that after he stopped, people left

through the rear and front doors; that plaintiff, who was the

first to get off, ran around the stop light in a half circle

in front of his bus and into the side of a coal truck going

south; that as he saw him run, he looked in his rear-view

mirror, noticed the truck, heard a horn and saw the boy come

in contact with the right rear of the truck.

On cross-examination both plaintiff and his friend had

testified that plaintiff did not run when crossing Central

avenue, but accelerated his pace because, as plaintiff testi-

fied, the bus had started and he had to walk faster in order

to clear it. When called for rebuttal, plaintiff testified

that he did not hear a horn at any time before the occurrence.

He have narrated the foregoing evidence with respect

to the salient facts in some detail to show that the material

issues of fact and the proof relating thereto were close and

conflicting, thus making it extremely important that the in-

structions to the jury be accurate, free of all error calculated

to mislead the jury, and a correct statement of the law appli-

cable to the issues involved. (McLain v. Fire, Inc., 296 Ill.

App. 345; Levanter v. Chicago City Ry. Co., 296 Ill. 284; Stanger

v. Jackson, 290 Ill. App. 304; Williams v. Pennsylvania Railroad

Co., 237 Ill. App. 49; and Peters v. Madison, 292 Ill. App. 417.)

It is urged by plaintiff as the sole ground for reversal that in

charging the jury by means of the instructions tendered by the defendants, the court misstated the law as to the material issues involved, both in individual instructions and in those given in groups purporting to cover a common subject, thus constituting prejudicial, reversible error and depriving plaintiff of a fair trial.

Criticism is made of several instructions touching upon the question of contributory negligence. At the time of the accident plaintiff was 13 years of age, and under the law of this state the degree of care imposed upon him at that age was not the same as the degree of care that the law imposes upon an adult. This principle grows out of the common-law rule that a child under the age of seven years was conclusively presumed not responsible for his acts; but between the ages of seven and fourteen years, although still so presumed to be not responsible, the presumption might be overcome by proof of the intelligence, capacity and experience of the child for one of his age. Based upon this premise, there has been evolved the rule that so far as the issue of contributory negligence is concerned, a minor under the age of 14 years, as a plaintiff, must prove as one of the elements of his case, that he was exercising that degree of care for his own safety that a boy of his age, intelligence, capacity and experience would exercise under the same or similar circumstances surrounding him before and at the time of the occurrence. (Wolczek v. Public Service Co., 342 Ill. 482; Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142; L. E. & W. R. R. Co. v. Klinkrath, 227 Ill. 439.) In considering instructions advising the jury of this rule of law, the courts have required a strict compliance with the foregoing principles. Thus, in Hughes v. Medendorp, 294 Ill. App. 424, one of the instructions charged

charging the jury by means of the instructions tendered by the defendants, the court misstated the law as to the material issues involved, both in individual instructions and in those given in groups purporting to cover a common subject, thus constituting prejudicial, reversible error and depriving plaintiff of a fair trial.

Criticism is made of several instructions touching upon the question of contributory negligence. At the time of the accident plaintiff was 13 years of age, and under the law of this state the degree of care imposed upon him at that age was not the same as the degree of care that the law im-

poses upon an adult. This principle grows out of the common-law rule that a child under the age of seven years was conclusively presumed not responsible for his acts; but between the ages of seven and fourteen years, although still so presumed to be not responsible, the presumption might be overcome by proof of the intelligence, capacity and experience of the child for one of his age. Based upon this premise, there has been evolved the rule that so far as the issue of contributory negligence is concerned, a minor under the age of 14 years, as a plaintiff, must prove as one of the elements of his case, that he was exercising that degree of care for his own safety that a boy of his age, intelligence, capacity and experience would exercise under the same or similar circumstances surrounding him before and at the time of the occurrence. (Polsek v. Public Service Co., 342 Ill. 482; Waskin v. C. & W. R. Co., 318 Ill. 142; L. E. & W. R. Co. v. Waskin, 327 Ill. 439.) In considering instructions advising the jury of this rule of law, the courts have required a strict com-

pliance with the foregoing principles. Thus, in Hynes v. Medenborg, 294 Ill. App. 424, one of the instructions charged

the jury that the burden of proof was on the plaintiff to show that his intestate, a minor aged 13, "was not guilty of any negligence whatever that in any way proximately contributed to the injury," ending in directory language. In discussing the doctrine involved and holding that the giving of such instruction was reversible error, the court said that "in this case the plaintiff was only required to prove by a preponderance of the evidence that at and just before the time in question plaintiff's intestate was exercising that degree of care that a boy of his age, intelligence, capacity and experience would exercise under the same or similar circumstances," and that "this instruction was erroneous because it held plaintiff's intestate to a higher degree of care than is required by the laws in this State," and in considering another instruction on contributory negligence the court stated that it was erroneous "in that it fails to inform the jury that they must further believe from the evidence, in so doing he was not exercising that degree of care that a boy of his age, intelligence and experience would exercise under the same or similar circumstances surrounding plaintiff's intestate at the time in question." The courts have gone even further than this in holding that where an attempt is made to limit the definition of contributory negligence within the rule discussed by language restricting the exercise of ordinary care to that of a child of the age, intelligence, capacity and experience of the minor plaintiff, the omission of one of those elements from the instructions constitutes reversible error. Thus, in Cassens v. Tillberg, 294 Ill. App. 168, the court in discussing instructions which omitted the element of "experience," held the instructions to be reversible error on the ground that that one element was a component part of the

the jury that the burden of proof was on the plaintiff to show that his intestate, a minor aged 13, "was not guilty of any negligence whatever that in any way proximately contributed to the injury," "acting in directory language. In discussing the doctrine involved and holding that the giving of such instruction was reversible error, the court said that "in this case the plaintiff was only required to prove by a preponderance of the evidence that at the time before the time in question plaintiff's intestate was exercising that degree of care that a boy of his age, intelligence, capacity and experience would exercise under the same or similar circumstances," and that "this instruction was erroneous because it held plaintiff's intestate to a higher degree of care than is required by the laws in this State," and in considering another instruction on contributory negligence the court stated that it was erroneous "in that it fails to inform the jury that they must further believe from the evidence, in so doing he was not exercising that degree of care that a boy of his age, intelligence and experience would exercise under the same or similar circumstances surrounding plaintiff's intestate at the time in question." The courts have gone even further than this in holding that where an attempt is made to limit the definition of contributory negligence within the rule discussed by language restricting the exercise of ordinary care to that of a child of the age, intelligence, capacity and experience of the minor plaintiff, the omission of one of those elements from the instructions constitutes reversible error. Thus, in Gasson v. Tillipster, 204 Ill. App. 166, the court in discussing instructions which omitted the element of "experience," held the instructions to be reversible error on the ground that that one element was a component part of the

standard of care that the law imposed on a minor, and that its omission from the instruction imposed a higher degree of care on the minor plaintiff. See also to the same effect Fowler v. C. & E. I. R. R. Co., 234 Ill. 619, and L. E. & W. R. R. Co. v. Klinkrath, 227 Ill. 439. In connection with instructions of this kind it has also been held that even though other instructions in the series, whether given by plaintiff or defendant, correctly defined the obligations of the plaintiff, nevertheless such instructions could not cure an error in defendant's instructions because the jury would thereby be given two statements of the law applicable, one of which was correct and the other incorrect, so that it could not be determined which one in fact the jury followed, or whether the jury was able to determine which one to follow. Fowler v. C. & E. I. R. R. Co., supra, and Cassens v. Tillberg, supra. It would therefore follow that an instruction or a series of instructions which imposes upon the plaintiff the duty of exercising a higher degree of care than is required by law to be exercised by a child of his age, or which required him to exercise the same degree of care for his safety as is required of an adult, without limitation, does not correctly state the law and constitutes prejudicial error. Plaintiff contends that in this proceeding there were four particular instructions tendered by the respective defendants purporting to deal with the question of contributory negligence of plaintiff, each of which directed a verdict either as to the ultimate question of liability or the issue of contributory negligence. The instructions criticised are numbered 11, 13, 20 and 36. In the first part of instruction No. 11, which informs the jury as to the duty imposed by law on this minor plaintiff, the court tells the jurors that if they believe from the evidence that on the occasion in question a person

from the evidence that on the occasion in question a person plaintiff, the court tells the jurors that it they believe informs the jury as to the duty imposed by law on this minor 20 and 36. In the first part of instruction No. 11, which negligence. The instructions criticised are numbered 11, 13, ultimate question of liability or the issue of contributory plaintiff, each of which directed a verdict either as to the to deal with the question of contributory negligence of instructions tendered by the respective defendants purporting contends that in this proceeding there were four particular state the law and constitutes prejudicial error. Plaintiff required of an adult, without limitation, does not correctly him to exercise the same degree of care for his safety as is law to be exercised by a child of his age, or which required duty of exercising a higher degree of care than is required by series of instructions which focuses upon the plaintiff the sums. It would therefore follow that an instruction or a Potter v. C. & E. I. R. Co., supra, and Gasseng v. Tillberg whether the jury was able to determine which one to follow, or not be determined which one in fact the jury followed, or which was correct and the other incorrect, so that it could thereby be given two statements of the law applicable, one of an error in defendant's instructions because the jury would the plaintiff, nevertheless such instructions could not cure plaintiff or defendant, correctly defined the obligations of through other instructions in the series, whether given by instructions of this kind it has also been held that even R. R. Co. v. Klinton, 237 Ill. 439. In connection with Polmer v. C. & E. I. R. Co., 234 Ill. 619, and L. & N. its omission from the instruction imposed a higher degree standard of care that the law imposed on a minor, and that

in the exercise of ordinary care, without limiting the definition of ordinary care to the requirement of the degree of care that would be exercised by a person of the age, experience, capacity and intelligence of the minor plaintiff, would have used his sense of sight, etc., then they must find that he was not in the exercise of ordinary care for one of his age, capacity, intelligence and experience at the time that he was injured. That part of instruction No. 11 imposes upon plaintiff the same standard of care that the law imposes upon an adult and does not limit the application of ordinary care to that required of a minor under the age of 14 years, but uses the term "exercise of ordinary care" in its broadest sense, without limitation of any kind, and then proceeds to advise the jury that failure upon the minor plaintiff's part to exercise the degree of ordinary care for his own safety which, within the definition given, is the same duty imposed upon an adult, is, under the law, such conduct on his part as leads to the conclusion that they must find that he was not in the exercise of ordinary care for one of his age, capacity, intelligence and experience at the time he was injured. In other words, the instruction as given directs the jury to determine and judge the conduct of plaintiff by the standard of duty imposed upon an adult, and further directs them to find that the failure of the minor plaintiff to exercise the degree of care or to perform the duty within the standard imposed upon adults, constitutes contributory negligence as a matter of law for one who is a minor. Of course the directory part of the instruction contains language of limitation as to the proper requirements, but the language of limitation is nowhere contained in the part of the instruction that defines the obligation and duty imposed upon the plaintiff as a guide in judging the conduct

in the exercise of ordinary care, without limiting the definition of ordinary care to the requirement of the degree of care that would be exercised by a person of the age, experience, capacity and intelligence of the minor plaintiff, would have used the same of right, etc., than they must find that he was not in the exercise of ordinary care for one of his age, capacity, intelligence and experience at the time that he was injured. That part of instruction No. 11 imposes upon plaintiff the same standard of care that the law imposes upon an adult and does not limit the application of ordinary care to that required of a minor under the age of 14 years, but uses the term "exercise of ordinary care" in its broadest sense, without limitation of any kind, and then proceeds to advise the jury that failure upon the minor plaintiff's part to exercise the degree of ordinary care for his own safety which, within the definition given, is the same duty imposed upon an adult, is, under the law, such conduct on his part as leads to the conclusion that they must find that he was not in the exercise of ordinary care for one of his age, capacity, intelligence and experience at the time he was injured. In other words, the instruction as given directs the jury to determine and judge the conduct of plaintiff by the standard of duty imposed upon an adult, and further directs him to find that the failure of the minor plaintiff to exercise the degree of care or to perform the duty within the standard imposed upon adults, constitutes contributory negligence as a matter of law for one who is a minor. Of course the directory part of the instruction concerning language of limitation as to the proper requirements, but the language of limitation is nowhere contained in the part of the instruction that defines the obligation and duty imposed upon the plaintiff as a guide in judging the conduct

of plaintiff before the jury reach their decision under the language of direction contained in the instruction.

Instruction No. 20 is subject to similar criticism. The first sentence minimizes the duty of defendants by comparison with the obligation or duty on the part of the plaintiff in that it limits the obligation of the adult and corporate defendants for the safety of the plaintiff to the same obligation or duty that is imposed upon the minor plaintiff. It also contains a statement, in discussing the duty of motorists and pedestrians, that "each must exercise the care that an ordinary prudent person would exercise under the same or similar circumstances," thus imposing the same duty on the minor plaintiff as is imposed upon the adult or corporate defendants, without limiting the duty imposed on plaintiff to the exercise of that degree of care that should be exercised for his own safety by one of his age, capacity, intelligence and experience, and fails to differentiate between the varying duties imposed upon the adult or corporate defendants and the minor plaintiff so far as the exercise of ordinary care is concerned. The final sentence and directory part of the instruction is subject to the same criticism. The effect of the instruction is that it imposes upon plaintiff a higher degree of care than is imposed by law and minimizes the duty of defendants to a lower degree of care than the law requires. At best it states a double standard of care on the part of plaintiff, without informing the jury as to which standard of care it is to invoke in judging his conduct, so that it cannot be determined by what standard of care the jury reached its final decision.

Instruction No. 13 advises the jury of the force and effect of a statute controlling traffic-signal lights. It is a lengthy instruction and purports to direct a verdict in

of plaintiff before the jury reach their decision under the language of instruction contained in the instruction.

Instruction No. 10 is subject to similar criticism.

The first sentence minimizes the duty of defendants by comparison with the obligation or duty on the part of the plaintiff in that it limits the obligation of the adult and corporate defendants for the safety of the plaintiff to the same obligation or duty that is imposed upon the minor plaintiff. It also contains a statement, in discussing the duty of motorists and pedestrians, that "each must exercise the care that an ordinary prudent person would exercise under the same or similar circumstances," thus imposing the same duty on the minor plaintiff as is imposed upon the adult or corporate defendants, without limiting the duty imposed on plaintiff to the exercise of that degree of care that should be exercised for his own safety by one of his age, capacity, intelligence and experience, and fails to differentiate between the varying duties imposed upon the adult or corporate defendants and the minor plaintiff so far as the exercise of ordinary care is concerned. The final sentence and directory part of the instruction is subject to the same criticism. The effect of the instruction is that it imposes upon plaintiff a higher degree of care than is imposed by law and minimizes the duty of defendants to a lower degree of care than the law requires. At best it states a double standard of care on the part of plaintiff, without informing the jury as to which standard of care it is to invoke in judging his conduct, so that it cannot be determined by what standard of care the jury reached its final decision.

Instruction No. 13 advises the jury of the force and effect of a statute controlling traffic-signal lights. It is a lengthy instruction and purports to direct a verdict in

favor of defendants on the basis of the state of the traffic signals, and concludes with the direction to the jury, "and if you further find that plaintiff saw, or in the exercise of ordinary care should have known that if he crossed said intersection he would come into collision with defendant's automobile truck." This instruction definitely imposes upon plaintiff the obligation of exercising ordinary care without limitation, within the same standard that is imposed upon adults, since it does not contain any language limiting the requirement of ordinary care on his part to that required of a child of his age, capacity, intelligence and experience. This instruction, which undertakes to determine the issue of right-of-way as between the plaintiff and defendants and which, on the basis of the language therein contained, directs the jury to find that defendants had the right-of-way, incorrectly states the law, even more so than the two foregoing instructions, and imposes upon plaintiff a duty far beyond the requirements of the law so far as the obligation of exercising care for his own safety where one of his status is concerned.

The beginning of instruction No. 36 reads as follows: "It is contended by the defendants that plaintiff was of such a mature age that, though a minor, he had such capacity, intelligence, experience and discretion as are ordinarily possessed of an adult"; then proceeds to tell the jury that if they believe from the evidence that plaintiff was of such maturity, although a minor, as required him to exercise the care ordinarily to be expected of an adult, then the fact that he was a minor is of no consequence in determining the question of his exercise of ordinary care, and then proceeds to charge that if they should find that plaintiff was not of such maturity, they should take into consideration in determining the degree of care to be exercised by him, his age,

favor of defendants on the basis of the state of the traffic signals, and concludes with the direction to the jury, "and if you further find that plaintiff saw, or in the exercise of

ordinary care should have known that it he crossed said

intersection he would come into collision with defendant's automobile truck." This instruction definitely imposes upon

plaintiff the obligation of exercising ordinary care without limitation, within the same standard that is imposed upon

adults, since it does not contain any language limiting the

requirement of ordinary care on his part to that required of

a child of his age, capacity, intelligence and experience.

This instruction, which undertakes to determine the issue of

right-of-way as between the plaintiff and defendants and which,

on the basis of the language therein contained, directs the

jury to find that defendants had the right-of-way, incorrectly

states the law, even more so than the two foregoing instructions,

and imposes upon plaintiff a duty far beyond the requirements

of the law so far as the obligation of exercising care for his

own safety where one of his status is concerned.

The beginning of instruction No. 36 reads as follows:

"It is contended by the defendants that plaintiff was of such

a mature age that, though a minor, he had such capacity, in-

telligence, experience and discretion as are ordinarily

possessed of an adult"; then proceeds to tell the jury that if

they believe from the evidence that plaintiff was of such

maturity, although a minor, as required him to exercise the

care ordinarily to be expected of an adult, then the fact

that he was a minor is of no consequence in determining the

question of his exercise of ordinary care, and then proceeds

to charge that if they should find that plaintiff was not of

such maturity, they should take into consideration in deter-

mining the degree of care to be exercised by him, his age,

capacity, intelligence, knowledge, experience and discretion, and concludes with the statement: "in any event he must be held to the exercise of such care as would reasonably be required of a person of his age, capacity, intelligence, knowledge, experience and discretion, as you find them from the evidence; ***." An examination of this instruction indicates that it contains the same contention which defendants jointly sought to advance throughout the trial, namely, that plaintiff had the maturity of an adult, and which they sought to inculcate in the minds of the jury in the taking of evidence, argument of counsel, and instructions, and when rendered to the jury through the voice of the court, it was highly prejudicial. In Williams v. Stearns, 256 Ill. App. 425, Lerette v. Davis, 225 Ill. App. 93, and Brewster v. Rockford Pub. Service Co., 257 Ill. App. 182, such instructions presented in the form of an argument, were held erroneous, prejudicial and reversible. The rule of law in this state is too well settled to require further comment that a boy of plaintiff's age is required to exercise that degree of care that a child of his age, capacity, intelligence and experience would exercise, and it is for the jury, within this principle of law, to determine whether the capacity, intelligence and experience of the minor child is such that he should exercise a greater degree of care than another child of his age. It is not for the court, however, to tell the jury what the contention of the defendants is with reference thereto, or that if the contention be believed by the jury, then they should regard plaintiff the same as an adult. The vice of this instruction is that it attempts to emphasize the argument made by defendants throughout the trial, and to create in the minds of the jury the impression sought to be conveyed.

Criticism is also leveled at instruction No. 14, dealing

Criticism is also leveled at instruction No. 14, dealing to be conveyed.

and to create in the minds of the jury the impression sought to emphasize the argument made by defendants throughout the trial, adult. The vice of this instruction is that it attempts to by the jury, than they should regard plaintiff the same as an with reference thereto, or that if the contention be believed to tell the jury that the contention of the defendants is another child of his age. It is not for the court, however, such that he should exercise a greater degree of care than capacity, intelligence and experience of the minor child is jury, within this principle of law, to determine whether the intelligence and experience would exercise, and it is for the exercise that degree of care that a child of his age, capacity, further comment that a boy of plaintiff's age is required to The rule of law in this state is too well settled to require an argument, were held erroneous, prejudicial and reversible. 257 Ill. App. 132, such instructions presented in the form of 257 Ill. App. 93, and Brewster v. Rockford Pub. Service Co., In Williams v. Bessner, 256 Ill. App. 425, Barretto v. Davis, jury through the voice of the court, it was highly prejudicial. ment of counsel, and instructions, and when rendered to the case in the minds of the jury in the taking of evidence, arguments and the maturity of an adult, and which they sought to inculcated to advance throughout the trial, namely, that plaintiff that it contains the same contention which defendants jointly evidence; " ". An examination of this instruction indicates age, experience and discretion, as you find them from the gained of a person of his age, capacity, intelligence, knowledge held to the exercise of such care as would reasonably be required and concludes with the statement: "in any event he must be capacity, intelligence, knowledge, experience and discretion,

with the comparative negligence of plaintiff and defendant. It begins by instructing the jury "that even though you believe that the defendant was negligent, nevertheless you may not find the defendant guilty unless you believe that a preponderance or greater weight of the evidence shows that the plaintiff was not guilty of any negligence, for one of his age, capacity, intelligence and experience, which proximately contributed in any degree to the happening of the accident"; the jury are then advised that they may not compare the negligence, if any, of the defendant with the negligence, if any, of the plaintiff, and they are then charged that "if you believe from the evidence that the plaintiff did anything which an ordinarily prudent person for one of his age, capacity, intelligence and experience, would not have done under the same or similar circumstances, and that such action or lack of action proximately contributed to the happening of the accident, then you must find the defendant not guilty." This charge in substance instructs the jury that slight negligence, as distinguished from ordinary negligence, would bar a recovery, and imposes upon plaintiff the burden of showing that he was not guilty of "any negligence" which proximately contributed "in any degree" to the happening of the accident, and concludes by advising the jury that if they believe that plaintiff "did anything which an ordinarily prudent person *** would not have done," then they must find the defendant not guilty. This language maximizes the duty of plaintiff and imposes upon him a greater degree of care than the law requires. It was so held in C. & E. I. R. R. Co. v. Randolph, 199 Ill. 126, wherein the court said that "Slight negligence is not incompatible with due and ordinary care, and if one has proceeded with ordinary care, though slightly negligent, he has observed the degree of care required by law," citing L. S. & M. S. Ry. Co. v.

with the comparative negligence of plaintiff and defendant.
It being by instructing the jury "that even though you be-
lieve that the defendant was negligent, nevertheless you may not
find the defendant guilty unless you believe that a propounder-
case or greater weight of the evidence shows that the plaintiff
was not guilty of any negligence, for one of his age, capacity,
intelligence and experience, which proximately contributed in
any degree to the happening of the accident"; the jury are then
advised that they may not compare the negligence, if any, of
the defendant with the negligence, if any, of the plaintiff,
and they are then directed that "if you believe from the evi-
dence that the plaintiff did anything which an ordinarily
prudent person for one of his age, capacity, intelligence
and experience, would not have done under the same or similar
circumstances, and that such action or lack of action prox-
imately contributed to the happening of the accident, then you
must find the defendant not guilty." This charge in substance
instructs the jury that slight negligence, as distinguished
from ordinary negligence, would bar a recovery, and imposes
upon plaintiff the burden of showing that he was not guilty of
"any negligence" which proximately contributed "in any degree"
to the happening of the accident, and concludes by advising the
jury that if they believe that plaintiff "did anything which
an ordinarily prudent person would not have done," then
they must find the defendant not guilty. This language im-
poses the duty of plaintiff and imposes upon him a greater
degree of care than the law requires. It was so held in
O. & N. E. Ry. Co. v. Randolph, 199 Ill. 126, wherein the
court said that "slight negligence is not incompatible with
due and ordinary care, and if one has proceeded with ordinary
care, though slightly negligent, he has observed the degree
of care required by law," citing E. & N. Ry. Co. v.

Hessions, 150 Ill. 546, and Chicago City Ry. Co. v. Dinsmore, 162 Ill. 658. The effect of this instruction was to impose the duty on plaintiff of showing not only that he had exercised the degree of care for his own safety that a person of his age, capacity, intelligence and experience would exercise, but in addition thereto, the burden of showing that he was not guilty of any negligence proximately contributing in any degree to the accident. Such requirement goes far beyond that which the law imposes upon him, and within the scope of this instruction the jury would be warranted in finding plaintiff guilty of contributory negligence on the basis of slight negligence on his part which contributed in some degree to the happening of the accident, although within the definition of contributory negligence under the law, it would not constitute contributory negligence, and it may well be that the jury took this view of the case on the basis of the misstatement of law contained in the instruction, which was directory and could not be cured by any other instruction in the series. Adamsen v. Magnelia, 286 Ill. App. 412.

One of defendant Lauterbach's instructions, No. 13, was clearly directory in nature as to the ultimate and real issue involved in the case, that is, as to who had the right-of-way under the stop-light statute. By its language the instruction, as it states the law, determines the ultimate issue of right-of-way on the single factor as to whether the light was green at the time that defendant was driving his automobile truck south at or near the intersection, and directs a verdict if, under such circumstances, plaintiff saw or should have known that unless he yielded the right-of-way there would be a collision. We had occasion to consider the question of the right-of-way at intersections regulated by stop-and-go lights in Mahan v. Richardson, 284 Ill. App. 493. Mr. Justice Scanlan, speaking for the

Hessinger, 150 Ill. 546, and Chicago City Ry. Co. v. Dismore,

152 Ill. 678. The effect of this instruction was to impose the duty on plaintiff of showing not only that he had exercised the degree of care for his own safety that a person of his age, capacity, intelligence and experience would exercise, but in addition thereto, the burden of showing that he was not guilty

of any negligence proximately contributing in any degree to the accident. Such requirement goes far beyond that which the law imposes upon him, and within the scope of this instruction the jury would be warranted in finding plaintiff guilty of contributory negligence on the basis of slight negligence on his part which contributed in some degree to the happening of the accident, although within the definition of contributory negligence under the law, it would not constitute contributory negligence, and it may well be that the jury took this view of the case on the basis of the misstatement of law contained in the instruction, which was directory and could not be cured by any other instruction in the series. Adams v. Langelis, 286 Ill. 412.

One of defendant Lauterbach's instructions, No. 13, was clearly directory in nature as to the ultimate and real issue involved in the case, that is, as to who had the right-of-way under the stop-light statute. By its language the instruction, as it states the law, determines the ultimate issue of right-of-way on the single factor as to whether the light was green at the time that defendant was driving his automobile truck south at or near the intersection, and directs a verdict if, under such circumstances, plaintiff saw or should have known that unless he yielded the right-of-way there would be a collision. We had occasion to consider the question of the right-of-way at intersections regulated by stop-and-go lights in Mahon v. Richard- son, 284 Ill. 493. Mr. Justice Scanlan, speaking for the

court, made an exhaustive review of the type of situation that is involved in the instant case, with the conclusion that one entering a street intersection under the direction of the traffic light, has the right-of-way, that it continues until he reaches the other side of the street, notwithstanding the fact that the color of the traffic lights may have changed during his crossing, and that the one first entering has the right to presume that he can pass over the intersection in safety and that traffic approaching the intersection would give him the opportunity to complete his crossing. In Landess v. Mahler, 295 Ill. App. 498, the court held that a "go" signal at an intersection is a qualified permission to proceed lawfully and carefully, and confers no authority on the motorist receiving the signal to proceed across the intersection regardless of other persons or other vehicles already within the intersection. Cahill v. Cummings, 322 Ill. App. 662, is to the same effect. In Tuttle v. Checker Taxi Co., 274 Ill. App. 525, a case also involving a pedestrian struck and injured by a motorist, the court held that an instruction given for the defendants was objectionable in that it in effect told the jury that if plaintiff did not yield the right-of-way to defendants' cab and because of this was injured, she could not recover. The court added that such a charge ignores the rule that both pedestrians and drivers of automobiles on the public streets are required by law to use care to avert accidents, and went on to say that motorists must use ordinary care for the safety of pedestrians. As worded, the instruction in the case at bar made the entire question of the right-of-way depend upon ~~the color of the lights~~ the single factor of the color of the lights while defendant was driving his truck south on Central avenue, without regard to the circumstances under which plaintiff entered the intersection, and under the clearly established

court, made an extensive review of the type of situation that is involved in the instant case, with the conclusion that one entering a street intersection under the direction of the traffic light, has the right-of-way, that it continues until he reaches the other side of the street, notwithstanding the fact that the color of the traffic lights may have changed during his crossing, and that the one first entering has the right to presume that he can pass over the intersection in safety and that traffic approaching the intersection would give him the opportunity to complete his crossing. In Jenkins v. Whelan, 295 Ill. App. 495, the court held that a "go" signal at an intersection is a qualified permission to proceed lawfully and carefully, and confers no authority on the motorist receiving the signal to proceed across the intersection regardless of other persons or other vehicles already within the intersection. Capill v. Cummings, 302 Ill. App. 502, is to the same effect. In Little v. Checker Taxi Co., 374 Ill. App. 525, a case also involving a pedestrian struck and injured by a motorist, the court held that an instruction given for the defendants was objectionable in that it in effect told the jury that if plaintiff did not yield the right-of-way to defendants' car and because of this was injured, she could not recover. The court added that such a charge ignores the rule that both pedestrians and drivers of automobiles on the public streets are required by law to use care to avoid accidents, and went on to say that motorists must use ordinary care for the safety of pedestrians. As worded, the instruction in the case at bar made the entire question of the right-of-way depend upon the single factor of the color of the lights while defendant was driving his truck south on Central Avenue, without regard to the circumstances under which plaintiff entered the intersection, and under the clearly established

rule in this state such an instruction is so erroneous and prejudicial as to require reversal.

Instruction No. 11 of the Lauterbach Coal and Ice Company, directory in nature as to the issue of contributory negligence, ignored entirely the principal issue of who had the right-of-way under the stop-light statute. Within the law stated in this instruction, even if plaintiff by reason of the circumstances involved, was under the facts entitled to the right-of-way to complete his crossing of the intersection, this instruction authorized the jury to disregard his right-of-way and to impose upon him the duty of anticipating a violation thereof or negligence on the part of the Lauterbach Coal and Ice Company. Such is not the law. Plaintiff had a right to assume that other persons approaching the intersection would observe the law and respect his right-of-way if he was entitled to it. Cahill v. Cummings, 322 Ill. App. 662; Salmon v. Wilson, 227 Ill. App. 286; and Riddle v. Mansager, 254 Ill. App. 68.

It would unduly extend this already lengthy opinion to discuss other instructions at which criticism is leveled. We think we have sufficiently indicated herein that several of the instructions tendered by defendants and given by the court incorrectly stated the law, or stated a double standard of care, or were so argumentative as to be prejudicial, and when it appears, as in this case, that the total number of instructions given at the request of both the defendants is out of proportion to the plain and simple issues involved, constantly repeating to the jury propositions of law favorable to the defendants and containing in some instances incorrect statements of the law imposing a greater burden on the plaintiff than the law required, it is easily conceivable that the

rule in this state such an instruction is so erroneous and prejudicial as to require reversal.

Instruction No. 11 of the Lusterbach Coal and Ice

Company, instructs the jury as to the issue of contributory negligence, ignored entirely the principal issue of the law of the right-of-way under the stop-light statute. Within the law stated in this instruction, even if plaintiff by reason of the circumstances involved, was under the facts entitled to the right-of-way to complete his crossing of the intersection, this instruction authorized the jury to disregard his right-of-way and to impose upon him the duty of watching for a violation thereof or negligence on the part of the Lusterbach Coal and Ice Company. Such is not the law. Plaintiff had a right to assume that other persons approaching the intersection would observe the law and respect his right-of-way if he was entitled to it. Calli v. Cummings, 322 Ill. App. 682; Wilson v. Wilson, 327 Ill. App. 306; and Widde v. Manager, 324 Ill. App. 68.

It would hardly extend this already lengthy opinion to discuss other instructions at which criticism is leveled. I think we have sufficiently indicated herein that several of the instructions tendered by defendants and given by the court incorrectly stated the law, or stated a double standard of care, or were so argumentative as to be prejudicial, and when it appears, as in this case, that the total number of instructions given at the request of both the defendants is out of proportion to the plain and simple issues involved, constantly repeating to the jury propositions of law favorable to the defendants and containing in some instances incorrect statements of the law imposing a greater burden on the plaintiff than the law required, it is easily conceivable that the

errors committed produced the verdict and judgment from which plaintiff appeals.

We have reached the conclusion that the ends of justice will be best served by a retrial of the case. The judgment of the Superior court is therefore reversed, and the cause remanded for retrial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR RETRIAL.

Scanlan and Sullivan, JJ., concur.

errors committed produced the verdict and judgment from which plaintiff appeals.

We have reached the conclusion that the ends of justice will be best served by a retrial of the case. The judgment of the superior court is therefore reversed, and the cause remanded for retrial.

JUDGMENT REVERSED AND CAUSE
REMANDED FOR RETRIAL.

Scaplan and Sullivan, JJ., concur.

43362

JOHN H. CHATZ, Trustee in
Bankruptcy of the Estate of
John W. Hight, Bankrupt,
(Plaintiff) Appellee,

v.
EDWARD I. BLOOM et al.,
Defendants.

EDWARD I. BLOOM,
(Defendant) Appellant.

329 I.A. 180²

APPEAL FROM CIRCUIT

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, as trustee in bankruptcy of the estate of John W. Hight, bankrupt, sued to recover that portion of a licensed insurance agent's earned commissions which were rebated and paid over by the insurance agent, John W. Hight, to the insured, the defendant, on the purchase by him of \$100,000 of life insurance on his life, which rebate plaintiff claimed was in direct violation of the "Anti-rebate" provision of the Insurance statute as it was in effect in 1935 and 1936. Upon a trial by the court without a jury there was a finding and judgment in favor of plaintiff and against defendant in the amount of \$2,892.37. Defendant appeals.

This is the second time this cause has been before us (see Chatz v. Bloom, 322 Ill. App. 435). Upon the first hearing the trial court sustained defendant's motion to strike plaintiff's amended complaint and dismissed the suit as to defendant. Plaintiff appealed. We reversed the judgment order and remanded the cause with directions to overrule defendant's motion to strike and to enter a rule on defendant to answer plaintiff's amended complaint. While the pleadings are fully set forth in our opinion upon the first appeal, we deem it advisable to again state them in order that the nature of plaintiff's claim and the defense then interposed may be made clear:

Count I of the amended complaint alleged, in substance,

3281.A.180
APRIL FROM COURT
COURT OF COOK COUNTY

JOHN W. GALT, Trustee in
Administration of the Estate of
John W. Galt, Plaintiff,
v.
JOHN W. GALT, Defendant.
Defendants.

MR. JUSTICE SCHMIDT DELIVERED THE OPINION OF THE COURT.
Plaintiff, as trustee in bankruptcy of the estate
of John W. Galt, Plaintiff, sued to recover that portion
of a licensed insurance agent's earned commissions which
were rebated and paid over by the insurance agent, John
W. Galt, to the insured, the defendant, on the purchase
by him of \$100,000 of life insurance on his life, which
rebate plaintiff claimed was in direct violation of the
"Anti-rebate" provision of the Insurance statute as it was
in effect in 1935 and 1936. Upon a trial by the court
without a jury there was a finding and judgment in favor
of plaintiff and against defendant in the amount of
\$2,892.37. Defendant appeals.

This is the second time this cause has been before
us (see Galt v. Galt, 322 Ill. App. 437). Upon the first
hearing the trial court sustained defendant's motion to
strike plaintiff's amended complaint and dismissed the suit
as to defendant. Plaintiff appealed. We reversed the
judgment order and remanded the cause with directions to
overrule defendant's motion to strike and to enter a rule
on defendant to answer plaintiff's amended complaint. While
the pleadings are fully set forth in our opinion upon the
first appeal, we deem it advisable to again state them in
order that the nature of plaintiff's claim and the defense
then interposed may be made clear:
Count I of the amended complaint alleged, in substance,

that on August 26, 1937, John W. Hight filed his voluntary petition for adjudication in bankruptcy in the United States District Court, at Chicago, and that he was adjudicated a bankrupt on the same day; that shortly thereafter, at the first meeting of creditors, plaintiff was duly elected the trustee of the bankrupt's estate, and qualified by filing his bond as required by law, and that he was still acting as such trustee; that pursuant to the Federal Bankruptcy Act, the right of action belonged to and was vested in him as such trustee; that for several years prior to the filing of his petition in bankruptcy, the bankrupt had been duly licensed and was regularly engaged in the business of selling life insurance in Illinois; that in August, 1935, he took applications from defendant Edward I. Bloom for the purchase by defendant of ordinary life insurance on his life, in the total principal sum of \$100,000, of which \$50,000 was purchased from The Mutual Life Insurance Co. of New York, and \$50,000 was purchased from the New England Mutual Life Insurance Co. of Boston, Massachusetts; that the respective insurance policies were issued during September and October, 1935; that at the time the respective applications were placed by defendant with the bankrupt, they entered into an unlawful and fraudulent agreement which provided that the bankrupt would rebate and pay over to defendant one-half of the earned initial commissions which the bankrupt would receive from the insurance companies, on the sale of said policies; that in addition thereto it was agreed that the bankrupt would rebate and pay over to defendant all of the renewal commissions to be subsequently earned by the bankrupt on premiums which defendant would thereafter pay on said insurance policies; that these arrangements and agreements were illegal and void, against public policy, and contrary

that on August 26, 1937, John W. might filed his voluntary petition for adjudication in bankruptcy in the United States District Court, at Chicago, and that he was adjudicated a bankrupt on the same day; that shortly thereafter, at the first meeting of creditors, plaintiff was duly elected the trustee of the bankrupt's estate, and qualified by filing his bond as required by law, and that he was still acting as such trustee; that pursuant to the Federal Bankruptcy Act, the right of action belonged to and was vested in him as such trustee; that for several years prior to the filing of his petition in bankruptcy, the bankrupt had been duly licensed and was regularly engaged in the business of selling life insurance in Illinois; that in August, 1937, he took applications from defendant Edward I. Bloom for the purchase by defendant of ordinary life insurance on his life, in the total principal sum of \$100,000, of which \$50,000 was purchased from The Mutual Life Insurance Co. of New York, and \$50,000 was purchased from the New England Mutual Life Insurance Co. of Boston, Massachusetts; that the respective insurance policies were issued during September and October, 1937; that at the time the respective applications were placed by defendant with the bankrupt, they entered into an unlawful and fraudulent agreement which provided that the bankrupt would rebate and pay over to defendant one-half of the earned initial commissions which the bankrupt would receive from the insurance companies, on the sale of said policies; that in addition thereto it was agreed that the bankrupt would rebate and pay over to defendant all of the renewal commissions to be subsequently earned by the bankrupt on premiums which defendant would thereafter pay on said insurance policies; that these arrangements and agreements were illegal and void, against public policy, and contrary

to the statute of Illinois, and were likewise contrary to the statutes of the States of New York and Massachusetts, where said respective insurance policies were issued; that the first year's premiums on the policies issued to defendant by The Mutual Life Insurance Company of New York amounted to \$3,342, and the bankrupt's earned initial commission thereon of 55%, was \$1,838.10; that the first year's premiums on the policies issued to defendant by the New England Mutual Life Insurance Company of Boston amounted to \$3,210, of which the bankrupt's earned initial commission thereon of 50% amounted to \$1,605; that defendant paid the premiums on all of said policies on or about October 21, 1935, on which date the bankrupt received payment of the aforesaid respective commissions, and on the same day the bankrupt paid over to defendant the sum of \$1,721, representing one-half of said earned commissions, which payment was made pursuant to said unlawful and fraudulent agreement; that on November 14, 1936, the bankrupt paid over to defendant the total sum of \$411.15 as illegal and fraudulent rebates of the first year's renewal commissions earned by the bankrupt on renewal premiums paid by defendant on said policies; that the amount sued for is the total sum of \$2,132.70, with statutory interest. Count IA of the amended complaint alleged that said sum of \$2,132.70 was paid over by the bankrupt to defendant without any legal, valid or actual consideration therefor, and was therefore recoverable by plaintiff as trustee of the bankruptcy estate.

Defendant's motion to strike the amended complaint averred, in substance, that plaintiff's rights are derivative and no greater or different than the rights of the bankrupt, and that plaintiff could not assert in the suit any greater or different rights than the bankrupt had or has; that the illegal arrangement had been fully executed, and that at the time that the rebate payments

to the state of Illinois, and were likewise contrary to the statutes of the states of New York and Massachusetts, where said respective insurance policies were issued; that the first year's premiums on the policies issued to defendant by The Mutual Life Insurance Company of New York amounted to \$3,342, and the bankrupt's earned initial commission thereon of 5%, was \$1,671.10; that the first year's premiums on the policies issued to defendant by the New England Mutual Life Insurance Company of Boston amounted to \$3,210, of which the bankrupt's earned initial commission thereon of 5% amounted to \$1,605; that defendant paid the premiums on all of said policies on or about October 1, 1935, on which date the bankrupt received payment of the aforesaid respective commissions, and on the same day the bankrupt paid over to defendant the sum of \$1,701, representing one-half of said earned commissions, which payment was made pursuant to said unlawful and fraudulent agreement; that on November 14, 1936, the bankrupt paid over to defendant the total sum of \$411.15 as illegal and fraudulent rebates of the first year's renewal commissions earned by the bankrupt on renewal premiums paid by defendant on said policies; that the amount sued for is the total sum of \$2,132.70, with statutory interest. Count 1A of the amended complaint alleged that said sum of \$2,132.70 was paid over by the bankrupt to defendant without any legal, valid or actual consideration therefor, and was therefore recoverable by plaintiff as trustee of the bankrupt's estate.

Defendant's motion to strike the amended complaint averred, in substance, that plaintiff's rights are derivative and no greater or different than the rights of the bankrupt, and that plaintiff could not assert in the suit any greater or different rights than the bankrupt had or has; that the illegal arrangement had been fully executed, and that at the time that the rebate payments

alleged in the complaint were made the bankrupt and defendant Bloom were acting illegally and in pari delicto, and therefore plaintiff could not maintain his action; as to count IA defendant averred that to permit a recovery by plaintiff would be against the public policy of the State of Illinois; that the provisions of the Federal Bankruptcy Act are inapplicable to plaintiff's right to maintain his action. Defendant further averred that there was a consideration and justification for such rebating because of the purchase by him from the bankrupt of the said insurance policies.

Upon the first appeal defendant contended: "I. Granting that the Trustee has the rights of a judgment lien creditor, the bankruptcy law does not vest in him any greater right than that possessed by the bankrupt to recover money paid out by the bankrupt almost two years prior to the bankruptcy at a time when the bankrupt must be deemed to be solvent." "II. The rebating agreement between the bankrupt and the defendant was executed, and the parties being equally at fault, neither a court of equity or of law will lend its powers or process in aid of either party, but will leave them exactly where it finds them." "III. There is no rule of public policy in the State of Illinois which is sufficient to negative the rule of pari delicto applicable to the present action." We held, after a full review of the complaint and the points made against it, that it set up a good cause of action against defendant and that the pari delicto rule could not be successfully urged against the suit of the trustee in bankruptcy.

When our mandate was filed in the Circuit court an order was entered directing defendant to answer the complaint, and in his answer defendant admitted that John W. Hight, the bankrupt, had been regularly engaged in the business of selling life insurance for several years prior to his bankruptcy, and that

alleged in the early int were made the bankrupt and defendant
Bloom was acting illegally and in pari delicto, and therefore
plaintiff could not maintain his action; as to count 1A defend-
ant averred that to permit a recovery by plaintiff would be
against the public policy of the State of Illinois; that the
provisions of the Federal Bankruptcy Act are inapplicable to
plaintiff's right to maintain his action. Defendant further
averred that there was a consideration and justification for
such rebating because of the purchase by him from the bankrupt
of the said insurance policies.

Upon the first appeal defendant contended: "I. Granting
that the Trustee has the rights of a judgment lien creditor, the
bankruptcy law does not vest in him any greater right than that
possessed by the bankrupt to recover money paid out by the bank-
rupt almost two years prior to the bankruptcy at a time when
the bankrupt must be deemed to be solvent." "II. The rebating
agreement between the bankrupt and the defendant was executed,
and the parties being equally at fault, neither a court of
equity or of law will lend its powers or process in aid of
either party, but will leave them exactly where it finds them."
"III. There is no rule of public policy in the State of
Illinois which is sufficient to negative the rule of pari
delicto applicable to the present action." He held, after a
full review of the complaint and the points made against it,
that it set up a good cause of action against defendant and
that the pari delicto rule could not be successfully urged
against the suit of the trustee in bankruptcy.
When our mandate was filed in the Circuit court an order
was entered directing defendant to answer the complaint, and in
his answer defendant admitted that John W. Night, the bankrupt,
had been regularly engaged in the business of selling life
insurance for several years prior to his bankruptcy, and that

he was licensed so to do by the Department of Insurance of the State of Illinois; denied the receipt of any moneys from the bankrupt, and pleaded the Statute of Limitations in bar of the action. Our opinion was filed on April 6, 1944, and the second trial started November 1, 1944. On September 29, 1944, defendant filed a "further answer," in which he alleged, for the first time, that he had a right to receive and retain the money because he was then "engaged in the business of an insurance agent in the City of Chicago and was duly licensed as such under the Licensing Statutes of the State of Illinois." Plaintiff filed a reply, in which he denied that defendant was duly engaged in the business of an insurance agent in the City of Chicago; denied that he was duly licensed as such under the Licensing Statutes of the State of Illinois; denied that he was authorized to share in any commissions earned in respect of the policies described in the complaint or that he could legally share in any such commissions; averred that defendant did not then or at any other time represent or take applications for life insurance for the insurance companies mentioned in the complaint.

The principal contention of defendant is that "the transaction between Edward I. Bloom and John W. Hight was not a rebate but merely the sharing of a commission between two parties licensed to receive it"; that he "was licensed as an agent and as a broker under the Illinois law at the time the transaction complained of took place," and "was entitled to such share of the commission as he and Hight might agree upon." There is force in plaintiff's argument that if the instant defense, upon which defendant now practically relies, were an honest one he would not have waited until a short time prior to the second trial before he asserted it; that he would have made the defense when he filed his answer to the complaint. It is an affirmative defense, and the law placed the burden upon

he was licensed to do by the Department of Insurance of the State of Illinois; denied the receipt of any moneys from the plaintiff, and pleaded the statute of limitations in bar of the action. Our opinion was filed on April 6, 1944, and the second trial started November 1, 1944. On September 1, 1944, defendant filed a "further answer," in which he alleged, for the first time, that he had a right to receive and retain the money because he was then "engaged in the business of an insurance agent in the City of Chicago and was duly licensed as such under the licensing statutes of the State of Illinois." Plaintiff filed a reply, in which he denied that defendant was duly engaged in the business of an insurance agent in the City of Chicago; denied that he was duly licensed as such under the licensing statutes of the State of Illinois; denied that he was authorized to share in any commissions earned in respect of the policies described in the complaint or that he could legally share in any such commissions; averred that defendant did not claim or at any other time represent or take applications for life insurance for the insurance companies mentioned in the complaint.

The principal contention of defendant is that "the transaction between Edward L. Bloom and John W. Night was not a rebate but merely the sharing of a commission between two parties licensed to receive it"; that he "was licensed as an agent and as a broker under the Illinois law at the time the transaction complained of took place," and "was entitled to share in the commission as he and Night might agree upon."

There is force in plaintiff's argument that at the instant defense, upon which defendant now practically relies, were an honest one he would not have waited until a short time prior to the second trial before he asserted it; that he would have made the defense when he filed his answer to the complaint. It is an affirmative defense, and the law placed the burden upon

defendant to prove it by a preponderance of the evidence. In his answer he admitted that for several years prior to the filing of the petition in bankruptcy John W. Hight had been regularly engaged in the business of selling life insurance and was licensed so to do by the Department of Insurance of the State of Illinois. He admitted that Hight was duly authorized to take applications for the sale of life insurance for Mutual Life Insurance Company of New York and New England Mutual Life Insurance Company of Boston, Massachusetts, through their respective agencies, and that he, defendant, "was never connected with the Mutual Life Insurance Company of New York or the New England Mutual Life Insurance Company of Boston, Massachusetts." Paragraph 563 of the Insurance Act (ch. 73, Ill. Rev. Stat. 1935) reads:

"Par. 563. Agents defined - Application of Act.]

Section 1. The term 'agents' as used in this Act shall include any person, partnership, association or corporation, who is a resident of this State or which is organized under the laws of this State and authorized by law to do an insurance agency business and who or which is authorized in writing by any insurer lawfully qualified to transact business in this State, to solicit, negotiate or effect contracts of insurance, including surety and fidelity bonds, directly from the assured or a representative of the assured on behalf of any insurer.

* * *

The authority to issue "an agent's certificate of authority" is vested by the Insurance Act in "the Director of Trade and Commerce," and he is authorized to issue such certificate "at the written request of any insurer authorized by law to transact business in this State." The following provisions of the Act (ch. 73, Ill. Rev. Stat. 1935) are also pertinent:

defendant to prove it by a preponderance of the evidence. In his answer he admitted that for several years prior to the filing of the petition in bankruptcy John W. Knight had been regularly engaged in the business of selling life insurance and was licensed so to do by the Department of Insurance of

the State of Illinois. He admitted that Knight was duly authorized to take applications for the sale of life insurance for Mutual Life Insurance Company of New York and New England Mutual Life Insurance Company of Boston, Massachusetts, through their respective agencies, and that he, defendant, was never connected with the Mutual Life Insurance Company of New York or the New England Mutual Life Insurance Company of Boston, Massachusetts." Paragraph 563 of the Insurance Act (ch. 73, Ill. Rev. Stat. 1937) reads:

"Par. 563. Agents defined - Application of Act. Section 1. The term 'agents' as used in this Act shall include any person, partnership, association or corporation, who is a resident of this State or which is organized under the laws of this State and authorized by law to do an insurance agency business and who or which is authorized in writing by any insurer lawfully qualified to transact business in this State, to solicit, negotiate or effect contracts of insurance, including surety and fidelity bonds, directly from the assured or a representative of the assured on behalf of any insurer.

* * *

The authority to issue "an agent's certificate of authority" is vested by the Insurance Act in "the Director of Trade and Commerce," and he is authorized to issue such certificate "at the written request of any insurer authorized by law to transact business in this State." The following provisions of the Act (ch. 73, Ill. Rev. Stat. 1937) are

also pertinent:

"Par. 565. Issuance of certificate of authority.]

Sec. 3. The Director of Trade and Commerce at the written request of any insurer authorized by law to transact business in this State shall issue such agent's certificate of authority to a person, partnership, association, or corporation applying therefor, who or which is trustworthy and is competent to transact an insurance agency business in such manner as to safeguard the interests of the insurer and the public. Immediately upon receipt of an application for a certificate of authority by the Director of Trade and Commerce, he shall issue a temporary certificate for a period not to exceed thirty (30) days in order that the applicant may qualify under the provisions of this Act as hereinafter provided."

"Par. 566. Application - Contents.] Sec. 4. Before any agent's certificate of authority shall be issued by the Director of Trade and Commerce there must be filed in his office a written application therefor. Such application shall be in the form prescribed by the Director of Trade and Commerce and must set forth:

"(a) The name and address of the applicant, * * *

"(b) Whether any certificate of authority as agent or broker has been issued or refused theretofore by the Director of Trade and Commerce to the applicant, * * *

"(c) The business in which the applicant has been engaged for the year next preceding the date of application, and, if employed by another, the name and address of such employer;

"(d) Such information as the Director of Trade and Commerce may require of applicants to enable him to determine their trustworthiness and competency to transact the insurance agency business in such manner as to safeguard the interests of the insurer and the public."

Sec. 3. The Director of Trade and Commerce at the written request of any insurer authorized by law to transact business in this State shall issue such agent's certificate of authority to a person, partnership, association, or corporation applying therefor, who or which is trustworthy and is competent to transact an insurance agency business in such manner as to safeguard the interests of the insurer and the public. Immediately upon receipt of an application for a certificate of authority by the Director of Trade and Commerce, he shall issue a temporary certificate for a period not to exceed thirty (30) days in order that the applicant may qualify under the provisions of this Act as hereinafter provided."

"Art. 366. Application - Contents. [Sec. 4. Before any agent's certificate of authority shall be issued by the Director of Trade and Commerce there must be filed in his office a written application therefor. Such application shall be in the form prescribed by the Director of Trade and Commerce and must set forth:

- "(a) The name and address of the applicant; * * *
- "(b) Whether any certificate of authority as agent or broker has been issued or refused theretofore by the Director of Trade and Commerce to the applicant; * * *
- "(c) The business in which the applicant has been engaged for the year next preceding the date of application, and, if employed by another, the name and address of such employer;

"(d) Such information as the Director of Trade and Commerce may require of applicants to enable him to determine their trustworthiness and competency to transact the insurance agency business in such manner as to safeguard the interests of the insurer and the public."

"Par. 567. Applicant's references.] Sec. 5. The applicant shall be vouched for by two reputable citizens of this State preferably insurance agents or insurance company executives, setting forth:

"(a) That the applicant is personally known to them;

"(b) That the applicant has had experience or instruction in the general or some special lines of insurance;

"(c) That the applicant is of good business reputation and is worthy of a certificate of authority;

"(d) That the applicant proposes to engage actively in the business of insurance."

"Par. 568. Personal examination.] Sec. 6. The Director of Trade and Commerce, may, whenever in his judgment it appears necessary or advisable, and also in order to determine the trustworthiness and competency of such applicant for a certificate of authority or for the renewal of a certificate of authority to transact the insurance agency business, require such applicant to submit to a personal examination, either oral or written, which shall be held in the county in which the applicant resides or has his principal place of business."

"Par. 569. Application to be signed and verified.] Sec. 7. Except as otherwise provided in this section, an application for an agent's certificate of authority must be signed and verified by the applicant and, if made by a partnership, association or corporation by each member, officer or director thereof to be authorized thereby to act as an agent."

Defendant failed to offer any competent proof in support of his affirmative defense. He did not produce the alleged license nor a certified copy of such license from the Director of Trade and Commerce, nor did he show that

"Art. 267. Applicant's references.] Sec. 5. The

applicant shall be vouched for by two reputable citizens of this state preferably insurance agents or insurance company executives, setting forth:

- "(a) That the applicant is personally known to them;
- "(b) That the applicant has had experience or insurance in the general or some special lines of insurance;
- "(c) That the applicant is of good business reputation and is worthy of a certificate of authority;
- "(d) That the applicant proposes to engage actively

in the business of insurance."

"Part. 268. Personal examination.] Sec. 6. The

Director of Trade and Commerce, may, whenever in his judgment it appears necessary or advisable, and also in order to determine the trustworthiness and competency of such applicant for a certificate of authority or for the renewal of a certificate of authority to transact the insurance agency business, require such applicant to submit to a personal examination, either oral or written, which shall be held in the county in which the applicant resides or has his principal place of business."

"Part. 269. Application to be signed and verified.]

Sec. 7. Except as otherwise provided in this section, an application for an agent's certificate of authority must be signed and verified by the applicant and, if made by a partnership, association or corporation by each member, officer or director thereof to be authorized thereby to act as an agent."

Defendant failed to offer any competent proof in support of his affirmative defense. He did not produce the alleged license nor a certified copy of such license from the Director of Trade and Commerce, nor did he show that

an application for a license in his behalf had been made by a "principal," as the Insurance Statute provides. Over the objection of plaintiff defendant was permitted to testify that he received "from the Secretary of State of Illinois a license as an agent in the State of Illinois * * * as a broker * * * as an agent"; that he had made a search among his effects for his original license for the year 1935 and that he was unable to find it; that records in his office as far back as 1935 had been destroyed; that he kept his records for four years. Defendant, in the trial court, made no effort to explain how the Secretary of State of Illinois could have issued him a license when the sole jurisdiction to issue such license was lodged under the Insurance Code in the Director of Trade and Commerce, but after plaintiff, in his brief filed in this court, had shown that under the Insurance Code the Director of Trade and Commerce had the sole right to issue a license, defendant's counsel, in the reply brief, states that defendant's testimony that he received from the Secretary of State of Illinois a license was made through inadvertence due to the fact that he, defendant's counsel, used the wrong State office in framing his question to the witness, and he urges that in our consideration of the evidence we should take cognizance of the mistake. There are facts in evidence that tend to cast suspicion upon the instant defense: In the application for insurance which defendant made to the New England/^{Mutual} Life Insurance Company, he was asked to state his occupation and he replied, "Real Estate & investments." Two months later, in an application he filed with that company for reinstatement of the policies he gave the same answer. In the application he placed with Mutual Life Insurance Company of New York he gave the same answer to the same question, and in response to a further question as to his present occupation he stated that he was an "Executive"; to

an application for a license in his behalf had been made by a "principal," as the Insurance Statute provides. Over the objection of plaintiff defendant was permitted to testify that he received "from the Secretary of State of Illinois a license as an agent in the State of Illinois * * * as a broker * * * as an agent"; that he had made a search among his effects for his original license for the year 1935 and that he was unable to find it; that records in his office as far back as 1935 had been destroyed; that he kept his records for four years. Defendant, in the trial court, made no effort to explain how the Secretary of State of Illinois could have issued him a license when the sole jurisdiction to issue such license was lodged under the Insurance Code in the Director of Trade and Commerce, but after plaintiff, in his brief filed in this court, had shown that under the Insurance Code the Director of Trade and Commerce had the sole right to issue a license, defendant's counsel, in the reply brief, states that defendant's testimony that he received from the Secretary of State of Illinois a license was made through inadvertence due to the fact that he, defendant's counsel, used the wrong State office in framing his question to the witness, and he urges that in our consideration of the evidence we should take cognizance of the mistake. There are facts in evidence that tend to cast suspicion upon the instant defense: In the application for insurance which defendant made to the New England Life Insurance Company, he was asked to state his occupation and he replied, "Real Estate & Investments." Two months later, in an application he filed with that company for reinstatement of the policies he gave the same answer. In the application he placed with Mutual Life Insurance Company of New York he gave the same answer to the same question, and in response to a further question as to his present occupation he stated that he was an "Executive"; to

a further question as to whether he had any other occupation he answered, "none." In the agent's certificate filed by Hight as the agent and broker in the transaction with the New England Mutual Life Insurance Company of Boston, Massachusetts, Hight stated that the defendant was engaged in "Real Estate & Real Estate investments." Furthermore, if defendant at the time of the transaction with Hight was a licensed agent under the Insurance Act, and if the transaction was, as he now claims, a legitimate and legal transaction, why was it necessary to resort to secret and devious actions in consummating the rebate deal? Defendant, as the insured, paid the full initial premiums by his own checks drawn on his personal bank account. He arranged to have Hight meet him at the Northern Trust Company, and there defendant cashed his checks. Hight testified that at defendant's suggestion they then went to the office of Babcock, Rushton & Co., where Bloom took him into a private office, closed the door, and split the money, one-half to Bloom and one-half to Hight. Defendant did not specifically deny this testimony, but he stated that he just could not remember it; that "I know I got the money. That is all I cared about." The subsequent rebates were received by defendant from Hight through Richard Salkin, an employee of defendant, with whom Hight had no previous acquaintance. Salkin was named as the assignee in the assignments of Hight's renewal commissions, executed by the latter as part of the original rebate deal. It appears from our opinion filed upon the first appeal that defendant relied strongly upon the defense of pari delicto (p. 449), which defense admitted the illegality of the rebating, but we refused to sustain that defense and it is reasonably clear that defendant's instant defense was devised when his pari delicto defense failed him. An able, experienced judge tried this case, and we are satisfied that he was justified in holding that defend-

a further question as to whether he had any other occupation
 he answered, "none." In the agent's certificate filed by
 him as the agent and broker in the transaction with the New
 England Mutual Life Insurance Company of Boston, Massachusetts,
 it is stated that the defendant was engaged in "Real Estate &
 Real Estate Investments." Furthermore, it is stated at the
 time of the transaction with Wright was a licensed agent under
 the Insurance Act, and if the transaction was, as he now claims,
 a legitimate and legal transaction, why was it necessary to
 resort to secret and evasive actions in conducting the rebate
 deals? Defendant, as the insured, paid the full initial premiums
 by his own checks drawn on his personal bank account. He
 arranged to have Wright meet him at the Northern Trust Company,
 and there defendant cashed his checks. Wright testified that at
 defendant's suggestion they then went to the office of Babcock,
 Nathan & Co., where Bloom took him into a private office,
 closed the door, and split the money, one-half to Bloom and
 one-half to Wright. Defendant did not specifically deny this
 testimony, but he stated that he just could not remember it;
 that "I know I got the money. What is all I cared about."
 The subsequent rebates were received by defendant from Wright
 through Richard Callin, an employee of defendant, with whom
 Wright had no previous acquaintance. Callin was named as the
 assignee in the assignments of Wright's renewal commissions,
 executed by the latter as part of the original rebate deal.
 It appears from our opinion filed upon the first appeal that
 defendant relied strongly upon the defense of part delicto
 (p. 449), which defense admitted the illegality of the rebating,
 but refused to admit in that defense and it is reasonably clear
 that defendant's instant defense was devised when his part delicto
 defense failed him. An able, experienced judge tried this case,
 and we are satisfied that he was justified in holding that defend-

ant had not successfully carried the burden of proving that he was a licensed agent under the Insurance Act.

Defendant contends that he offered in evidence a letter of the Department of Insurance of the State of Illinois and that the trial court erred in excluding it. The letter is dated June 1, 1944, is addressed to the attorney of defendant, is headed, "Department of Insurance Springfield", and is signed, "F. W. Luigg, Supervisor of Licenses." The pertinent part in the letter, upon which defendant relies, is the following: "The records of this office are retained in the Archives for seven years and we will be unable to furnish you with certified copy of 1935 license." It is a sufficient answer to the instant contention to say that all documents of official character from the Insurance Department of the State of Illinois, if they are to be used in evidence, must be issued in the name and under the authority of the Department of Insurance and under the official seal of that Department, and when so authenticated they are admissible in evidence. (See sec. 405, par. 1017, ch. 73, Ill. Rev. Stat. 1945.) The letter offered in evidence was not such a document as is admissible under Section 405. We are not impressed with the argument of defendant that he was handicapped in procuring a certified copy of his license for the year 1935 by the fact that the Department of Insurance retained the records of the office in the archives for only seven years. The complaint in the instant proceeding was filed August 12, 1940. Defendant then knew the nature of plaintiff's claim and he still had two years in which he might have obtained a certificate from the Department of Insurance. He testified that his records for the year 1935, which included the alleged license, were kept for only four years. Nevertheless he did not write to the Department of Insurance concerning the alleged license until May 29, 1944.

and had not successfully carried the burden of proving that he was a licensed agent under the Insurance Act.

Defendant contends that he offered in evidence a letter of the Department of Insurance of the State of Illinois and that the trial court erred in excluding it. The letter is dated June 1, 1944, is addressed to the attorney of defendant, is headed, "Department of Insurance Springfield", and is signed, "T. W. Lutz, Supervisor of Licenses." The pertinent part in the letter, upon which defendant relies, is the following: "The records of this office are retained in the Archives for seven years and we will be unable to furnish you with certified copy of 1935 license." It is a sufficient answer to the instant contention to say that all documents of official character from the Insurance Department of the State of Illinois, if they are to be used in evidence, must be issued in the name and under the authority of the Department of Insurance and under the official seal of that Department, and when so authenticated they are admissible in evidence. (See sec. 405, par. 1017, ch. 73, Ill. Rev. Stat. 1943.) The letter offered in evidence was not such a document as is admissible under Section 405. We are not impressed with the argument of defendant that he was handicapped in procuring a certified copy of his license for the year 1935 by the fact that the Department of Insurance retained the records of the office in the archives for only seven years. The complaint in the instant proceeding was filed August 12, 1940. Defendant then knew the nature of plaintiff's claim and he still had two years in which he might have obtained a certificate from the Department of Insurance. He testified that his records for the year 1935, which included the alleged license, were kept for only four years. Nevertheless he did not write to the Department of Insurance concerning the alleged license until May 29, 1944.

Defendant contends that the trial court erred in excluding certain alleged records of the Glens Falls Insurance Company, Glens Falls Indemnity Company and The Liverpool & London Globe Insurance Company that defendant argues tend to support his claim that an insurance license had been issued to him for the year 1935. The offered evidence was clearly inadmissible. Defendant further contends that the trial court erred in excluding his books of account, offered by him, because, defendant argues, these books show that he charged the moneys that he paid for the policies against moneys in his possession that belonged to his children, and that the offered evidence would show that the children, "the owners of the policies were not the recipients of any rebate." Defendant cites no authority in support of this far-fetched contention. The children are not parties to this action and no claim is made that they violated the anti-rebate Act. Defendant admitted in his pleadings and upon the trial the splitting of the insurance agent's commission with him and therefore a violation of the anti-rebate statute was established against him, as he failed to prove that he was a licensed agent under the Insurance Act. We are unable to see how the fact, if it be a fact, that defendant sometime after the consummation of the deal with Hight made charges against his children in his books of account for all moneys that he paid on account of the policies would avoid his violation of the anti-rebate Act. Sec. 1, par. 252, ch. 73, Smith-Hurd Ill. Rev. Stat. 1935, reads as follows:

"* * * No person, co-partnership, or corporation shall receive or accept from any life insurance carrier, officer, agent, general agent, representative or broker, or any other person, any such rebate of premium or any part thereof, payable on a policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable

Defendant contends that the trial court erred in excluding certain alleged records of the Glens Falls Insurance Company, Glens Falls Indemnity Company and The Liverpool & London Globe Insurance Company that defendant argues tend to support his claim that an insurance license had been issued to him for the year 1935. The offered evidence was clearly inadmissible. Defendant further contends that the trial court erred in excluding his books of account, offered by him, because, defendant argues, these books show that he charged the moneys that he paid for the policies against moneys in his possession that belonged to his children, and that the offered evidence would show that the children, "the owners of the policies were not the residents of any rebate." Defendant offers no authority in support of this far-fetched contention. The children are not parties to this action and no claim is made that they violated the anti-rebate Act. Defendant admitted in his pleadings and upon the trial the splitting of the insurance agent's commission with him and therefore a violation of the anti-rebate statute was established against him, as he failed to prove that he was a licensed agent under the Insurance Act. We are unable to see how the fact, if it be a fact, that defendant sometimes after the consummation of the deal with High charges against his children in his books of account for all moneys that he paid on account of the policies would avoid his violation of the anti-rebate Act. Sec. 1, par. 252, ch. 73, Smith-Lund Ill. Rev. Stat. 1935, reads as follows:

"No person, co-partnership, or corporation shall receive or accept from any life insurance carrier, officer, agent, general agent, representative or broker, or any other person, any such rebate of premium or any part thereof, payable on a policy, or any special favor or advantage in the dividends or other benefits to accrue thereon, or any valuable

-13-

consideration or inducement not specified in the policy of insurance. * * *

Defendant has had a fair trial and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

condition or inducement not specified in the policy

of insurance. * * *

Defendant has had a fair trial and the judgment

of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

43461

329 I.A. 181

CLINTON C. CLARKE and ALLAN D. GRANT,
as Special Administrator of the
Estate of Mary B. Warner, deceased,
(Plaintiffs) Appellants,

v.

ROBERT D. BAIRD, as Executor under
the Last Will and Testament of
Clay M. Baird, deceased; WILLIAM A.
FISHER; JOHN E. STEWART; CARL DEVOE;
CHICAGO TITLE & TRUST COMPANY, as
Trustee under a certain trust deed
recorded in the Office of the Re-
corder of Deeds of Cook County, Ill-
inois, as Document No. 4966287; LOU
WEINER; RUTH WEINER and Unknown Owners,
Defendants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

385

ROBERT D. BAIRD, as Executor under
the Last Will and Testament of Clay
M. Baird, deceased,
(Defendant) Appellee.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs filed a suit in equity to foreclose a mortgage on premises commonly known as 230 West Randolph street, Chicago. In the decree of foreclosure entered appears the following: "That the defendant Clay M. Baird purchased said property in 1924; that he deducted the amount of the said then existing principal indebtedness from the purchase price; that he impliedly assumed the payment of said principal indebtedness maturing May 13, 1932 and was personally liable therefor; that, however, his plea of the five-year statute of limitations filed herein as to such personal liability is well founded in law and in fact to this suit brought December 26, 1941 both as to said principal indebtedness and any interest thereon." The decree confirming the sale found that there was a deficiency of \$49,255.78, but denied plaintiffs a personal decree against the executor under the last will and testament of Clay M. Baird, deceased. Plaintiffs appeal from both decrees only so far as they denied them

3201.A.151

43421

CLAYTON C. LAMM and ALAN D. GRANT,
as Special Administrator of the
Estate of CLAY B. BAIRD, deceased,
(Plaintiffs) Appellants,

v.

ROBERT D. BAIRD, as Executor under
the Last Will and Testament of
CLAY B. BAIRD, deceased; WILLIAM A.
BAIRD; JOHN A. BAIRD; CARL BAIRD;
CHICAGO TRUST & INVEST COMPANY, as
Trustee under a certain trust deed
recorded in the Office of the Re-
corder of Deeds of Cook County, Ill-
inois, as Document No. 496887; DON
BAIRD; JOHN BAIRD and Unknown Owners,
(Defendants).

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

ROBERT D. BAIRD, as Executor under
the Last Will and Testament of CLAY
B. BAIRD, deceased,
(Defendant) Appellee.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.
Plaintiffs filed a suit in equity to foreclose a
mortgage on premises commonly known as 230 West Randolph
street, Chicago. In the decree of foreclosure entered
appears the following: "That the defendant CLAY B. BAIRD
purchased said property in 1924; that he deducted the amount
of the said then existing principal indebtedness from the
purchase price; that he impliedly assumed the payment of
said principal indebtedness maturing May 13, 1932 and was
personally liable therefor; that, however, his plea of the
five-year statute of limitations filed herein as to such
personal liability is well founded in law and in fact to
this suit brought December 26, 1941 both as to said principal
indebtedness and any interest thereon." The decree confirming
the sale found that there was a deficiency of \$40,252.78, but
denied plaintiffs a personal decree against the executor under
the last will and testament of CLAY B. BAIRD, deceased. Plain-
tiffs appeal from both decrees only so far as they denied them

a personal decree against the executor of the estate of Baird.

The material facts in the case are: On May 13, 1912, William A. Fisher, defendant, executed two promissory notes to Clinton C. Clarke and Mary B. Warner, deceased, in the aggregate sum of \$35,000, payable ten years after date, and also executed and delivered a trust deed conveying the premises in suit to Chicago Title and Trust Company, a corporation, as trustee, to secure the payment of the indebtedness. On April 5, 1921, the maturity of the mortgage indebtedness was extended to May 13, 1932, by an extension agreement signed by the instant plaintiffs and John E. Stewart and Marie H. Stewart, the then owners of the equity in the premises. On March 14, 1924, the then owners of the equity, Albert Pick and wife, conveyed the premises to Clay Baird by warranty deed, which recites that the conveyance was subject to general taxes and special assessments after the year 1923, building and zoning ordinances, existing leases and to the lien of a trust deed dated March 13, 1912, securing a principal indebtedness of \$35,000, due by extension May 13, 1932. On December 19, 1928, the property was reconveyed by Clay Baird to Albert Pick by warranty deed which contained an express covenant by the grantee, Albert Pick, assuming payment of the original principal notes, as extended, together with interest. During the pendency of this cause in the court below plaintiffs executed an instrument under seal in which they covenanted with Pick, in consideration of a payment of \$4,000 to them by Pick, that he should not be sued or molested on account of his express covenant contained in the warranty deed from Baird to him.

The complaint alleges that Baird, in paying Pick for the property, first deducted from the purchase price fixed

the complaint alleges that during, in paying Pick for the property, that deducted from the purchase price fixed the warranty deed from him to him.

or noted on account of his express covenant contained in payment of \$4,000 to them by Pick, that he should not be sued in which they covenanted with Pick, in consideration of a the court below plaintiffs executed an instrument under seal together with interest. During the pendency of this cause in standing payment of the original principal notes, as extended, contained an express covenant by the parties, Albert Pick, conveyed by Pick, and to Albert Pick by warranty deed which May 13, 1932. On December 19, 1940, the property was reconsecured a principal indebtedness of \$5,000, due by extension leased and to the lien of a trust deed dated March 13, 1912, after the year 1923, building and zoning ordinances, existing and was subject to general taxes and special assessments Olav Pick by warranty deed, which recites that the conveyance to the equity, Albert Pick and wife, conveyed the premises to in the premises. On March 14, 1924, the then owners of Stewart and Marie M. Stewart, the then owners of the equity agreement signed by the instant plaintiffs and John H. indebtedness was extended to May 13, 1932, by an extension deed. On April 1, 1941, the equity of the mortgage in- premises in and to Chicago Title and Trust Company, a cor- also executed and delivered a trust deed conveying the aggregate sum of \$5,000, payable ten years after date, and to Clinton C. Clarke and Mary B. Warner, deceased, in the William A. Fisher, defendant, executed two promissory notes on May 13, 1912, in the case are: On May 13, 1912, a personal decree against the executor of the estate of

the amount of the \$35,000 mortgage, "and thereby impliedly agreed to become and became personally bound to pay said mortgage indebtedness upon its maturity as theretofore extended of record." While the complaint also alleges that Baird executed a written contract of purchase in which he undertook to pay the mortgage indebtedness, no evidence was adduced that supported this allegation. The master found that Baird purchased the property for \$56,000, deducted the incumbrance of \$35,000, and paid to Pick \$21,000. The decree followed this finding. After the contract between plaintiffs and Pick was executed plaintiffs dismissed the suit as to Pick.

Plaintiffs contend that "a grantee of mortgaged real estate who has become liable for the mortgage indebtedness in consequence of having deducted the amount of the mortgage from the purchase price may not plead the five year statute of limitations in bar of his liability." Defendant contends: "The obligation of an assuming grantee who has deducted the amount of the mortgage indebtedness from the consideration for the conveyance is an implied in fact agreement and subject to the five year statute of limitations."

Counsel for plaintiffs strenuously argue that, in equity and justice, the ten year Statute of Limitations should be applied in the instant case. They cite decisions from some of the sister States which hold that the obligation of an assuming grantee is the same indebtedness as that of the mortgagor by equitable subrogation and that the Statute of Limitations to be applied is the one that runs against the mortgage obligation. Plaintiffs contend that the foregoing rule follows equitable principles and is supported by the great weight of authority. Defendant contends that the foregoing rule is in conflict with the great weight of authority, and he cites decisions of sister States that do not follow

--3--

the amount of the \$25,000 mortgage, "and thereby impliedly agreed to become and become personally bound to pay said mortgage indebtedness upon its maturity as theretofore extended of record." While the complaint also alleges that said executed a written contract of purchase in which he undertook to pay the mortgage indebtedness, no evidence was adduced that supported this allegation. The master found that said party purchased the property for \$25,000, deducted the encumbrance of \$25,000, and paid to Pick \$25,000. The decree followed this finding. After the contest between plaintiffs and Pick was executed plaintiffs dismissed the suit as to Pick. Plaintiffs contend that "a grantee of mortgaged real estate who has become liable for the mortgage indebtedness in consequence of having deducted the amount of the mortgage from the purchase price may not plead the five year statute of limitations in bar of his liability." Defendant contends: "The obligation of an assuming grantee who has deducted the amount of the mortgage indebtedness from the consideration for the conveyance is an implied in fact agreement and subject to the five year statute of limitations."

Counsel for plaintiffs strenuously argue that, in equity and justice, the ten year statute of limitations should be applied in the instant case. They cite decisions from some of the sister States which hold that the obligation of an assuming grantee is the same indebtedness as that of the mortgagor by equitable subrogation and that the State of limitations to be applied is the one that runs against the mortgage obligation. Plaintiffs contend that the foregoing rule follows equitable principles and is supported by the great weight of authority. Defendant contends that the foregoing rule is in conflict with the great weight of authority, and he cites decisions of sister States that do not follow

the equitable subrogation doctrine and that hold that the obligation of the assuming grantee is a separate contract. Defendant argues that the Statute of Limitations to be applied in a given case depends upon the nature of the separate contract. In our view of this appeal it would serve no useful purpose to review cases of sister States that have been cited by each of the parties because, in our judgment, the decisions of our Supreme court and our Statute of Limitations control our decision upon the question before us.

In the early case of Comstock v. Hitt, 37 Ill. 542-543, the Supreme court ruled that taking a deed "subject to an outstanding mortgage" creates no personal liability on the grantee to pay off the incumbrance, unless he has specially agreed to do so, or the amount of the mortgage has been deducted from the purchase price; that "Where the payment of an outstanding mortgage is part of the purchase price of the land, the law will imply an agreement to pay it." (p. 548) It is unnecessary to cite the many cases that have followed the rule announced in the Comstock case. That rule has never been modified. In Conerty v. Richtsteig, 379 Ill. 360, the court states (pp. 361, 362):

"The undisputed facts are that on July 1, 1920, Richard J. Richtsteig purchased the property located at the northeast corner of Congress and Sangamon streets, Chicago, for \$15,000. As part of the purchase price he and his wife executed their joint promissory note for \$9000, dated July 1, 1920, due July 1, 1925, with interest until maturity at six per cent per annum, and after maturity, at seven per cent. To secure payment of this note the Richtsteigs executed a trust deed on the property which contained, inter alia, the following provision: 'The grantors covenant and agree * * * to pay said indebtedness and

the equitable subrogation doctrine and that hold that the obligation of the assuming grantee is a separate contract. Defendant argues that the statute of limitations to be applied in a given case depends upon the nature of the separate contract. In our view of this appeal it would serve no useful purpose to review cases of sister states that have been cited by each of the parties because, in our judgment, the decisions of our Supreme Court and our statute of limitations control our decision upon the question before us.

In the early case of Goswick v. Witt, 27 Ill. 242, 54, the Supreme Court ruled that taking a deed "subject to an outstanding mortgage" creates no personal liability on the grantee to pay off the incumbrance, unless he has specially agreed to do so, or the amount of the mortgage has been deducted from the purchase price; that "where the payment of an outstanding mortgage is part of the purchase price of the land, the law will imply an agreement to pay it." (p. 242) It is unnecessary to cite the many cases that have followed the rule announced in the Goswick case. That rule has never been modified. In Goswick v. Witt, 27 Ill. 242, the court states (pp. 241, 242):

"The undisputed facts are that on July 1, 1920, Richard J. Nichtatelski purchased the property located at the northeast corner of Congress and Bangeman streets, Chicago, for \$15,000. As part of the purchase price he and his wife executed their joint promissory note for \$9000, dated July 1, 1920, due July 1, 1925, with interest until maturity at six per cent per annum, and after maturity, at seven per cent. To secure payment of this note the Nichtatelskis executed a trust deed on the property which contained, inter alia, the following provision: 'The grantors covenant and agree * * * to pay said indebtedness and

the interest thereon, as herein and in said notes provided, or according to any agreement extending time of payment.' On February 6, 1923, the Richtsteigs sold the mortgaged property to Hecht Nielsen for \$18,000. Nielsen assumed the first mortgage of \$9000, gave the Richtsteigs \$5300 in cash and a second mortgage for \$3700. The interest on the note was paid until maturity July 1, 1925. A few days before the maturity of the note, the agent for the owner of the note and Nielsen and his wife executed an agreement whereby payment of the principal debt was extended for five years, or until July 1, 1930, and the rate of interest was increased to six and one-half per cent. At the time of this extension the mortgaged property was reasonably worth from \$18,000 to \$20,000. In 1930, the note was extended until July 1, 1935. The interest on the mortgage debt was paid by Nielsen until July 1, 1936. Upon default in payment, the holder of the note, Nellie M. Conerty, filed this foreclosure suit September 4, 1936. The Richtsteigs did not have personal knowledge of either of the above extensions, and had no connection with the property or the loan from the date they sold the property to Nielsen in 1923, until they were served with summons in the foreclosure suit on September 11, 1936. As stated above, the trust deed was foreclosed, the property sold, and a deficiency judgment of \$5442.42 was rendered against the Richtsteigs."

The appellants in that case, the Richtsteigs, contended (p. 362) "that the Statute of Limitations has run as to them; that the holder of the note was guilty of laches; that the provision in the trust deed quoted above did not authorize an extension of the time of payment without their consent and that the extensions made to Nielsen did not prevent the Statute of Limitations from running as to them." The Supreme court, after

the interest thereon, as herein and in said notes provided, of according to any agreement extending this of payment.

On February 6, 1923, the Richtsteigs sold the mortgaged property to Hecht Nielsen for \$18,000. Nielsen assumed the first mortgage of \$2000, gave the Richtsteigs \$2300 in cash and a second mortgage for \$3700. The interest on the note was paid until maturity July 1, 1925. A few days before the maturity of the note, the agent for the owner of the note and Nielsen and his wife executed an agreement whereby payment of the principal debt was extended for five years, or until July 1, 1930, and the rate of interest was increased to six and one-half per cent. At the time of this extension the mortgaged property was reasonably worth \$18,000 to \$20,000. In 1930, the note was extended until July 1, 1935. The interest on the mortgage debt was paid by Nielsen until July 1, 1936. Upon default in payment, the holder of the note, Nellie M. Conarty, filed this foreclosure suit September 4, 1936. The Richtsteigs did not have personal knowledge of either of the above extensions, and had no connection with the property or the loan from the date they sold the property to Nielsen in 1923, until they were served with summons in the foreclosure suit on September 11, 1936. As stated above, the trust deed was foreclosed, the property sold, and a deficiency judgment of \$2442.42 was rendered against the Richtsteigs.

The appellants in that case, the Richtsteigs, contended (p. 302) "that the statute of limitations has run as to them; that the holder of the note was guilty of laches; that the provision in the trust deed quoted above did not authorize an extension of the time of payment without their consent and that the extensions made to Nielsen did not prevent the statute of limitations from running as to them." The Supreme court, after

reviewing a number of authorities, held (p. 365): "The better rule seems to be, that the note and mortgage are separate undertakings. The note relates to, and contains the contract of the maker to pay the debt and is wholly independent of the mortgage. The mortgage is not dependent upon the note executed by the mortgagors, for its validity. The note which is the evidence of the indebtedness may be made by third parties, or a mortgage may be valid where there is no note given. The mortgage relates only to the real estate pledged as security for the payment of the debt." In concluding its opinion the court held (p. 369):

"The personal liability of the grantee who accepts a deed in which he assumes and agrees to pay the mortgage debt, is based on his assumption agreement. Such grantee is not liable on the note. It is not his contract. His liability rests entirely on his agreement by which he assumed and agreed to pay the debt. He cannot be sued on the note because it is not his obligation. His liability can only be established by showing the making of the deed containing such agreement and his ratification and acceptance of the agreement by accepting the deed. This constitutes his contract."

In Siegel v. Borland, 191 Ill. 107, the court said (p. 112): "The implied contract to pay to the holder of an encumbrance money retained for that purpose arises only from the presumed understanding of the parties. It is implied because the facts justify the inference that such was the mutual intention; * * *" The liability of the defendant in the instant case is based upon Baird's assumption agreement, which constituted his contract. That Baird did not expressly undertake in writing to pay the mortgage is clear, but because he retained the amount of the mortgage in purchasing the property the law implies an agreement by him to pay it. The

reverting a number of authorities, held (p. 265): "The better rule seems to be, that the note and mortgage are separate instruments. The note relates to, and contains the contract of the maker to pay the debt and is wholly independent of the mortgage. The mortgage is not dependent upon the note executed by the mortgagor, for its validity. The note which is the evidence of the indebtedness may be made by third parties, or a mortgage may be valid where there is no note given. The mortgage relates only to the real estate pledged as security for the payment of the debt." In concluding its opinion the

court held (p. 265):

"The personal liability of the grantee who accepts a deed in which he assumes and agrees to pay the mortgage debt, is based on his assumption agreement. Such grantee is not liable on the note. It is not his contract. His liability rests entirely on his agreement by which he assumed and agreed to pay the debt. He cannot be sued on the note because it is not his obligation. His liability can only be established by showing the terms of the deed containing such agreement and his ratification and acceptance of the agreement by accepting the deed. This constitutes his contract."

In Wheeler v. Toward, 121 Ill. 105, the court said (p. 112): "The implied contract to pay to the holder of an encumbrance money retained for that purpose arises only from the presumed understanding of the parties. It is implied because the facts justify the inference that such was the mutual intention." "The liability of the defendant in the instant case is based upon Baird's assumption agreement, which constituted his contract. That Baird did not expressly undertake in writing to pay the mortgage is clear, but because he retained the amount of the mortgage in purchasing the property the law implies an agreement by him to pay it. The

Limitations Act provides, in part (Ill. Rev. Stat., 1943, ch. 83, par. 16, sec. 15): "Actions on unwritten contracts, expressed or implied, * * * shall be commenced within five years next after the cause of action accrued." We hold that the instant contention of plaintiffs cannot be sustained, and that the trial court did not err in holding that the five year Statute of Limitations applied.

Plaintiffs contend that "when, in a mortgage foreclosure proceeding, a grantee who assumed the mortgage indebtedness pleads the five year statute of limitations the court of equity in such proceeding will apply a period of laches in conformity with the ten year statute of limitations which is applicable to the mortgage indebtedness." In support of this contention plaintiffs cite Puterbaugh Chancery Pleading, 7th Ed., Vol. 1, page 239, where the author states: "While courts of equity usually follow the law in applying the statute of limitations, and especially so in cases where courts of law and equity have concurrent jurisdiction, nevertheless where the jurisdiction of courts of equity is exclusive, it is not bound by the limitations applicable to actions at law but may restrict or enlarge them according to the peculiar circumstances of the particular case."

In Harding v. Durand, 138 Ill. 515, where the Statute of Limitations had been pleaded, the court stated (p. 516):

"Among the defenses set up and relied upon in the answer is that of the Statute of Limitations. The rule is, where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statutory bar as the former. (Quayle v. Guild, 91 Ill. 378; Hancock v. Harper, 86 id. 445; Carter v. Tice, 120 id. 277.) If, therefore, an action at law on these notes would be barred, these bills to foreclose are barred."

Limitation Act provides, in part (III. Sec. 1943, ch. 2, par. 12, sec. 12): "Actions on written contracts, expressed or implied, * * * shall be commenced within five years next after the cause of action accrued." It holds that the instant contention of plaintiffs cannot be sustained, and that the trial court did not err in holding that the five year statute of limitations applied.

Plaintiffs contend that "when, in a mortgage foreclosure proceeding, a trustee who assumed the mortgage indebtedness pleads the five year statute of limitations the court of equity in such proceeding will apply a period of laches in conformity with the ten year statute of limitations which is applicable to the mortgage indebtedness." In support of this contention plaintiffs cite Wetherburn Chancery Pleading, 7th Ed., Vol. 1, page 239, where the author states: "While courts of equity usually follow the law in applying the statute of limitations, and especially so in cases where courts of law and equity have concurrent jurisdiction, nevertheless where the jurisdiction of courts of equity is exclusive, it is not bound by the limitations applicable to actions at law but may restrict or enlarge them according to the peculiar circumstances of the particular case."

In Harding v. Durrant, 138 Ill. 251, where the statute of limitations had been pleaded, the court stated (p. 256): "Among the defenses set up and relied upon in the answer is that of the statute of limitations. The rule is, where there is a legal and an equitable remedy in respect to the same subject matter, the latter is under the control of the same statute bar as the former. (Wayne v. Child, 21 Ill. 378; Knock v. Hager, 86 Ill. 447; Garter v. Rice, 120 Ill. 277.) If, therefore, an action at law on these notes would be barred, these bills to foreclose are barred."

In Webster v. Fleming, 178 Ill. 140, it was held that the mortgagee may bring assumpsit against the assuming grantee or obtain a personal decree against him in a foreclosure proceeding. To the same effect are Merriman v. Schmitt, 211 Ill. 263, and Scholten v. Barber, 217 Ill. 148. The instant contention of plaintiffs, therefore, cannot be sustained.

Plaintiffs contend: "When the purchaser of mortgaged premises acquired the same at an auction sale conducted under written terms and conditions which included the assumption of the encumbrance, such written terms and conditions constituted a contract in writing to which neither the five year statute of limitations nor the statute of frauds is applicable." We have carefully followed the strained argument made in support of this contention that the dealings between the auctioneer and Baird when considered together constituted a contract in writing, and find it without merit. Indeed, plaintiffs were obliged to introduce parol evidence to make out a case from which the law would imply an agreement by Baird to pay the outstanding mortgage. Where it is necessary to introduce parol evidence in order to prove the contract, the contract is not in writing under the statute. See Novosk v. Reznick, 323 Ill. App. 544, 551, and cases cited therein.

Defendant argues that "the release of Albert Pick also released Clay Baird," but we do not deem it necessary to pass upon this contention.

The foreclosure decree and the decree confirming the sale, entered by the Circuit court of Cook county, are both affirmed.

FORECLOSURE DECREE AND DECREE
CONFIRMING SALE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

In Reister v. Reister, 170 Ill. 140, it was held that the mortgagee may bring assumpsit against the assuming grantee to obtain a personal decree against him in a foreclosure proceeding. In the same effect see Reister v. Reister, 211 Ill. 403, and Reister v. Reister, 171 Ill. 148. The instant contention of plaintiffs, therefore, cannot be sustained.

Plaintiffs contend: "When the purchaser of mortgaged premises signed the same at an auction sale conducted under written terms and conditions which included the assumption of the encumbrance, each written term and condition constituted a contract in writing to which neither the five year statute of limitations nor the statute of frauds is applicable." We have carefully followed the strained argument made in support of this contention that the dealings between the auctioneer and Reister when considered together constituted a contract in writing, and find it without merit. Indeed, plaintiffs were obliged to introduce prior evidence to make out a case from which the law would imply an agreement by Reister to pay the outstanding mortgage. Where it is necessary to introduce prior evidence in order to prove the contract, the contract is not in writing under the statute. See Reister v. Reister, 203 Ill. App. 244, 251, and cases cited therein.

Defendant argues that "the release of Liberty Pick also released Clay Pick," but we do not deem it necessary to pass upon this contention.

The foreclosures were in the decree confirming the sale, entered by the Circuit Court of Cook County, are both affirmed.

FORECLOSURE DECREE AND DECREE
CONFIRMING SALE AFFIRMED.

Thompson, J., and Sullivan, J., concur.

43643

FRANCES NEPERMANN, Appellee,

v.

LEO NEPERMANN, Appellant.

386 A
APPEAL FROM SUPERIOR COURT

OF COOK COUNTY.

329 I.A. 182'

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint for divorce in which she alleged that defendant, her husband, had been guilty of extreme and repeated cruelty toward her on a number of occasions. The case was referred to a master in chancery, who heard evidence as to the alleged cruelty, the needs of plaintiff for herself and two minor children, and defendant's income. The master filed a report, the chancellor overruled the exceptions of defendant to it, and entered a decree in accordance with the recommendations of the master. Defendant appeals.

The following is the report of the master:

"I find that the plaintiff is now and has for more than one year last past been a resident of the county of Cook, in the State of Illinois.

"That plaintiff and defendant were married at Palatine, Illinois, on April 5th, 1936, and separated on April 6th, 1944.

"That as issue of said marriage there are now living two children viz:- Jeanette, now of the age of five years Gloyd, now of the age of five and one half months, and that both of said children are in the care and custody of said plaintiff.

"I further find that the defendant has been guilty of extreme and repeated cruelty to the plaintiff that said acts were committed on February 18th, 1944 and April 6th, 1944 and at divers other times.

PLAINTIFF'S EXHIBIT

Exhibit

v.

DEFENDANT'S EXHIBIT

Exhibit

OFFICE OF THE CLERK OF THE COURT

OF COOK COUNTY.

321 A. 188

IN RE: JUDITH SCARLETT, PETITIONER FOR WRIT OF HABEAS CORPUS.

Plaintiff filed a complaint for divorce in which she

alleged that defendant, her husband, had been guilty of

extreme and repeated cruelty toward her in a number of

occasions. The case was referred to a master in chancery,

who heard evidence as to the alleged cruelty, the needs of

plaintiff for herself and two minor children, and defendant's

income. The master filed a report, the chancellor overruled

the exceptions of defendant to it, and entered a decree in

accordance with the recommendations of the master. Defendant

appeals.

The following is the report of the master:

"I find that the plaintiff is now and has for more than

one year last past been a resident of the county of Cook, in

the State of Illinois.

"That plaintiff and defendant were married at Palestine,

Illinois, on April 25th, 1936, and separated on April 6th, 1944.

"That as far as issue of said marriage there are now living

two children viz: - Kenneth, now of the age of five years

eight, now of the age of five and one half months, and that

both of said children are in the care and custody of said

plaintiff.

"I further find that the defendant has been guilty of

extreme and repeated cruelty to the plaintiff that said acts

were committed on February 18th, 1944 and April 6th, 1944 and

at diverse other times.

"I further find that the plaintiff is without any income of her own, is not employed and is living with her aunt, where she is taking care of said children.

"I further find that the defendant is engaged in dairy farming on a farm located near Palatine, Illinois; that said farm is rented from defendant's father on a share basis and that his income from said farm is approximately Three Hundred Twenty-five Dollars per month.

"I further find that the farm, machinery and implements and equipment are owned by the defendant, but that there is a chattel mortgage thereon held by the defendant's father, upon which the defendant is obligated to pay the sum of Fifty Dollars per month.

"I therefore recommend that a decree be entered herein dissolving the marriage and granting a divorce to the plaintiff, Frances Nepperman, from the defendant, Leo Nepermann; and I further recommend that said decree provide that the defendant pay to the plaintiff the sum of Ninety Dollars per month as alimony for the support of herself and said children, until the further order of the Court; that said plaintiff be awarded the care, custody and education of said children, providing however, for the defendant to visit the children at reasonable times.

"I further recommend that said decree provide a reasonable amount to be paid to the plaintiff as and for her attorney's fees."

Defendant contends that "the chancellor's finding that defendant was guilty of extreme and repeated cruelty is not supported by the evidence." Defendant argues that the acts complained of are not such acts as endangered plaintiff's life or limb or raised a reasonable apprehension of great

"I further find that the plaintiff is without any income of her own, is not employed and is living with her aunt, where she is taking care of said children.

"I further find that the defendant is engaged in dairy farming on a farm located near Palestine, Illinois; that said farm is rented from defendant's father on a share basis and that his income from said farm is approximately three hundred twenty-five dollars per month.

"I further find that the farm, machinery and implements and equipment are owned by the defendant, but that there is a chattel mortgage thereon held by the defendant's father, upon which the defendant is obligated to pay the sum of fifty dollars per month.

"I therefore recommend that a decree be entered herein dissolving the marriage and granting a divorce to the plaintiff, Francis Heppner, from the defendant, Leo Heppner; and I further recommend that said decree provide that the defendant pay to the plaintiff the sum of twenty dollars per month as alimony for the support of herself and said children, until the further order of the Court; that said plaintiff be awarded the care, custody and education of said children, providing however, for the defendant to visit the children at reasonable times.

"I further recommend that said decree provide a reasonable amount to be paid to the plaintiff as and for her attorney's fees."

Defendant contends that "the chancellor's finding that defendant was guilty of extreme and repeated cruelty is not supported by the evidence." Defendant argues that the acts complained of are not such acts as endangered plaintiff's life or limb or raised a reasonable apprehension of great

bodily harm, and therefore she failed to prove extreme and repeated cruelty under the divorce statute. However, we doubt if defendant is seriously concerned about the decree save as it affects him financially. Indeed, it is stated in defendant's brief: "He [defendant] cannot, however, comply with the Decree and pay \$90.00 support money, \$200.00 attorneys' fees, court costs and Master's fees with vegetables, butter, milk and eggs. He is unable financially to comply with the Decree and he, therefore, had no alternative than to perfect this appeal."

The parties lived upon a farm, operated by defendant. Chickens, turkeys, ducks, sheep and hogs were raised on the farm. Defendant had four horses in 1944, and he sold five hogs that year. There were twenty-eight cows on the farm and defendant shipped ten or eleven cans of milk a day to the Bowman Dairy. Plaintiff testified that they were getting three or four dozen eggs per day when she left the farm. Defendant has machinery on the farm worth \$1,500.

Plaintiff testified that on eight or ten occasions defendant told her to get out "and go down the road." Defendant testified that upon one occasion he "told her if she did not like it she could leave." Plaintiff further testified that for two years she and her husband had arguments about his "going out" with an eighteen year old girl and that her husband told her "if I did not like his association with this girl I could go down the road, that is all he wanted me to do"; that this girl would call on the telephone and ask for her husband; that in July, 1943, she left the home after an argument with her husband about the girl, but that she came back in September, 1943. Defendant did not deny any of the testimony of plaintiff as to his association with the girl. It appears from the evidence that in spite of the treatment she received from her

bodily harm, and therefore she failed to prove extreme and repeated cruelty under the divorce statute. However, we doubt if defendant is seriously concerned about the decree save as it affects him financially. Indeed, it is stated in defendant's brief: "He [defendant] cannot, however, comply with the decree and pay \$90.00 support money, \$200.00 attorneys' fees, court costs and doctor's fees with vegetables, butter, milk and eggs. He is unable financially to comply with the decree and he, therefore, had no alternative than to perfect this appeal."

The parties lived upon a farm, operated by defendant. Chickens, turkeys, ducks, sheep and hogs were raised on the farm. Defendant had four horses in 1944, and he sold five hogs that year. There were twenty-eight cows on the farm and defendant shipped ten or eleven cans of milk a day to the Bowman Dairy. Plaintiff testified that they were getting three or four dozen eggs per day when she left the farm. Defendant has machinery on the farm worth \$1,500.

Plaintiff testified that on eight or ten occasions defendant told her to get out "and go down the road." Defendant testified that upon one occasion he "told her if she did not like it she could leave." Plaintiff further testified that for two years she and her husband had arguments about his "going out" with an eighteen year old girl and that her husband told her "if I did not like his association with this girl I could go down the road, that is all he wanted me to do"; that this girl would call on the telephone and ask for her husband; that in July, 1943, she left the home after an argument with her husband about the girl, but that she came back in September, 1943. Defendant did not deny any of the testimony of plaintiff as to his association with the girl. It appears from the evidence that in spite of the treatment she received from her

husband plaintiff remained at the home until the final separation because she had no parents, no place to go, and she wanted a home for the children. Plaintiff testified that her husband struck her upon three occasions, at least; that on February 18, 1944, her little son had been dead a year that day and she wanted to go the cemetery to visit his grave, and she asked her husband if she could have the car or truck to go there, but he refused her request and told her that it was not necessary for her to go to the cemetery; that they had an argument about the matter and she told her husband she wanted to go, and he told her to go down the road and take a bus, and "he hauled off and hit me" on the shoulder and breast; that it was red afterward where he had struck her; that on April 6, 1944, they had an argument about butchering the pigs and she stated that she would like a voice as to the manner in which the butchering should be done, as "it was mine as well as his"; that she stated that she wanted to go over to the place where they were to butcher the pigs and she started to put on her coat, and defendant struck her about the head, face, shoulders and breast; that she was pregnant at the time; that he "pushed me in the face" and told her to go down the road and get out. Plaintiff testified that she could not fix the date of one of the three assaults. Cora Ella Comfort, the aunt of plaintiff, testified that she saw plaintiff on April 7, 1944, and observed her condition; that she had marks on her shoulder; that her face and her side were injured, it was marked; there were bruises; that plaintiff was expecting a baby at the time. This testimony of the aunt corroborated plaintiff's testimony as to the assaults and is sufficient confirmation of the assaults. (See Muir v. Muir, 310 Ill. App. 443, 446.) Certain testimony given by defendant tends to confirm plaintiff's testimony as to the acts of personal violence

plaintiff's testimony as to the acts of personal violence
446.) Certain testimony given by defendant tends to confirm
plaintiff's testimony as to the assaults. (See Ill. v. [redacted], 310 Ill. App. 443,
plaintiff's testimony as to the assaults and is sufficient con-
firmation of the same. This testimony of the aunt corroborated
marked; there were bruises; that plaintiff was expecting a
baby at the time. It was observed her condition; that she had marks on
her shoulder; that her face and her side were injured, it was
date of one of the three assaults. Cornelia Comfort, the
and get out. Plaintiff testified that she could not fix the
he "punched me in the face" and told her to go down the road
shoulders and breast; that she was pregnant at the time; that
put on her coat, and defendant struck her about the head, face,
place where they were to butcher the pigs and she started to
as his"; that she stated that she wanted to go over to the
which the butchering should be done, as "it was mine as well
and she stated that she would like a voice as to the manner in
April 6, 1944, they had an argument about butchering the pigs
that it was red afterward where he had struck her; that on
and "he pulled off and hit me" on the shoulder and breast;
to go, and he told her to go down the road and take a bus,
argument about the matter and she told her husband she wanted
not necessary for her to go to the cemetery; that they had an
go there, but he refused her request and told her that it was
she asked her husband if she could have the car or truck to
day and she wanted to go to the cemetery to visit his grave, and
February 18, 1944, her little son had been dead a year that
husband struck her upon three occasions, at least; that on
wanted a home for the children. Plaintiff testified that her
tion because she had no parents, no place to go, and she
husband plaintiff remained at the home until the final separa-

on the part of her husband. He testified: "I may have pushed her but not in a manner of meanness, but in slapping her that would be in a spirit of playfulness." The first assault, considering the circumstances that surrounded it, was a cruel and wanton act; and the second assault committed by defendant upon his wife, then in a pregnant condition, was an act of unspeakable cruelty, and it shows conclusively the character and disposition of defendant. His conduct in connection with the young girl undoubtedly caused the wife more pain than the blows that he inflicted upon her. "Any willful misconduct of the husband which exposes the wife to bodily hazard and intolerable hardship and renders cohabitation unsafe is extreme cruelty. 'Whenever force and violence, preceded by deliberate insult and abuse, have been wantonly and without provocation used, the wife can hardly be considered safe.' (Poor v. Poor, 8 N. H. 307.)" (Lipe v. Lipe, 327 Ill. 39, 43.) There is not the slightest merit in the instant contention.

Defendant contends that "the decree requiring plaintiff [defendant] to pay \$90.00 per month alimony and support money is exorbitant because it is predicated on an erroneous finding by the Chancellor that defendant's earnings approximated \$325.00 per month." As we have heretofore stated, it is this part of the decree that brought about this appeal. Neither in the trial court nor in this court do we find any statement or suggestion by defendant that he is able and willing to pay anything for the support of his wife and the two small children. There is no denial of the testimony of plaintiff that she has no income save the amount of alimony she receives from her husband under the order of court. Defendant received from plaintiff \$900, the proceeds of an insurance policy on furniture that she purchased when the parties were married and that was destroyed in a fire. Plaintiff received \$1,300 from

on the part of her husband. He testified: "I may have pushed her but not in a manner of meanness, but in slapping her that would be in a spirit of playfulness." The first assault, considering the circumstances that surrounded it, was a cruel and wanton act; and the second assault committed by defendant upon his wife, then in a pregnant condition, was an act of unpare- able cruelty, and it shows conclusively the character and dis- position of defendant. His conduct in connection with the young girl undoubtedly caused the wife more pain than the blows that he inflicted upon her. "Any willful misconduct of the husband which exposes the wife to bodily hazard and intolerable hardship and renders cohabitation unsafe is extreme cruelty." Whenever force and violence, preceded by deliberate insult and abuse, have been wantonly and without provocation used, the wife can hardly be considered safe." (Poot v. Poot, 8 N. H. 307.) (Lape v. Lape, 127 Ill. 39, 43.) There is not the slightest merit in the instant contention.

Defendant contends that "the decree regarding plaintiff [defendant] to pay \$30.00 per month alimony and support money is erroneous because it is predicated on an erroneous finding by the Chancellor that defendant's earnings approximated \$35.00 per month." As we have heretofore stated, it is this part of the decree that brought about this appeal. Neither in the trial court nor in this court do we find any statement or suggestion by defendant that he is able and willing to pay anything for the support of his wife and the two small chil- dren. There is no denial of the testimony of plaintiff that she has no income save the amount of alimony she receives from her husband under the order of court. Defendant received from plaintiff \$500, the proceeds of an insurance policy on the life of the wife, which she purchased when the parties were married and that was destroyed in a fire. Plaintiff received \$1,300 from

her mother's estate and it was used for household expenses. The master went fully into the question of defendant's income and expenses, and came to the conclusion that defendant was able to pay plaintiff for the support of herself and the two children \$90 per month. An experienced chancellor sustained this finding of the master. After a careful examination of the evidence we find no good reason for disturbing that finding. Defendant claims that he must pay his father one-half of the net income that he derives from the farm; that his father has a mortgage on the farm machinery and that he must pay his father \$50 per month on the mortgage; that when he has met his obligations to his father and other creditors, he is just able to eke out an existence and is in no position to pay alimony for the support of his wife and children.

The decree of the Superior court of Cook county is affirmed in all respects.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

her other's estate and it was used for household expenses.
The master went fully into the question of defendant's income
and expenses, and came to the conclusion that defendant was
able to pay plaintiff for the support of herself and the two
children \$20 per month. An experienced chancellor sustained
this finding of the master. After a careful examination of
the evidence we find no good reason for disturbing that find-
ing. Defendant claims that he must pay his father one-half
of the net income that he derives from the farm; that his
father has a mortgage on the farm machinery and that he must
pay his father \$50 per month on the mortgage; that when he
has met his obligations to his father and other creditors,
he is just able to eke out an existence and is in no position
to pay alimony for the support of his wife and children.
The decree of the Superior court of Cook county is
affirmed in all respects.

DECEMBER TWENTY.

Friend, P. E., and William, J., counsel.

43447

NORINE BIDWELL,
Appellant,

v.

JOHN T. DEMPSEY,
Administrator of the
Estate of HARRY J. ROBERTS,
Deceased,
Appellee.

4
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

370
329 I.A. 182²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Norine Bidwell, filed an amended complaint in equity against John T. Dempsey, administrator of the estate of Harry J. Roberts, deceased, in which she sought to compel the specific performance by said administrator of an oral contract alleged to have been made between her and the decedent, whereby in return for certain personal services to be rendered by her to him he agreed to pay her by executing his last will and testament bequeathing to her his entire estate consisting solely of personal property. The cause was referred to a master in chancery for hearing. In his report the master found that the equities were with plaintiff and that the material allegations of her amended complaint "are true and proven" and recommended that a decree be entered in her favor. The chancellor sustained defendant's exceptions to the master's report and entered a decree on January 15, 1945 dismissing plaintiff's complaint for want of equity and ordering her to pay the master's fee amounting to \$388.80. Plaintiff appeals. She included in her notice of appeal an order entered by the chancellor on December 19, 1944, but inasmuch as that was not a final order, it is unnecessary to consider same.

Plaintiff's amended complaint alleged that the decedent for a number of years before he died was suffering from dia-

1944

JOHN T. LEWIS, JR.
Appellant,

v.

JOHN T. LEWIS, JR.
Administrator of the
Estate of ALICE J. LEWIS,
Decedent,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

MR. JUSTICE WILLIAM DELIVERED THE OPINION OF THE COURT.

Plaintiff, John T. Lewis, Jr., filed an amended complaint in equity against John T. Lewis, Jr., administrator of the estate of Alice J. Lewis, deceased, in which she sought to compel the specific performance by said administrator of an oral contract alleged to have been made between her and the decedent, whereby in return for certain personal services to be rendered by her to him he agreed to pay her by executing his last will and testament bequeathing to her his entire estate consisting solely of personal property. The case was referred to a master in chancery for hearing. In his report the master found that the equities were with plaintiff and that the material allegations of her amended complaint "are true and proven" and recommended that a decree be entered in her favor. The chancellor sustained defendant's exceptions to the master's report and entered a decree on January 15, 1944, dismissing plaintiff's complaint for want of equity and ordering her to pay the master's fee amounting to \$388.00. Plaintiff appeals. She included in her notice of appeal an order entered by the chancellor on December 19, 1944, but inasmuch as that was not a final order, it is unnecessary to consider same.

Plaintiff's amended complaint alleged that the decedent for a number of years before he died was suffering from dis-

betes; that four years prior to his death he requested her to take care of him; that in response to his request she did take care of him thereafter and "was his constant companion"; that she cleaned and looked after his apartment, nursed him, cooked for him, mended his clothes and looked after him generally; that during said period she was employed by the United States Board of Health and rendered the aforesaid services to the decedent "evenings, Sundays and holidays and at all other times" when she was not occupied with the duties of her position; and that she received no remuneration from the decedent for such services.

The complaint then proceeded with the following allegations pertaining to the decedent's purported oral contract with plaintiff: "That some time during the latter part of October, 1941, the said Harry J. Roberts applied to the plaintiff herein to leave her place of employment and devote her entire time to him in the continuance of the services above stated; that said decedent stated that he was fond of the plaintiff herein, and that he became accustomed to the care and attention that she gave him; that he did not want to lose the same, and applied to the plaintiff further not to choose any friends, but to be his companion and devote all of her time to him.

"That in consideration of said plaintiff complying with the request of the said decedent as aforestated, he agreed orally that he would devise and bequeath to the plaintiff by his Last Will and Testament all of his property of which he would die seized and possessed, which at the time, he stated consisted of personal property valued at approximately Seven Thousand Dollars (\$7,000.00).

"That in compliance with said agreement, said plaintiff during the said latter part of October, 1941, resigned from

dates; that four years prior to his death he requested her to take care of him; that in response to his request she did take care of him thereafter and "was his constant companion"; that she cleaned and looked after his apartment, nursed him, cooked for him, handled his clothes and looked after him generally;

that during said period she was employed by the United States Board of Pensions and rendered the foregoing services to the decedent "evenings, Sundays and holidays and at all other times" when she was not occupied with the duties of her position; and that she received no remuneration from the decedent for such services.

The court then proceeded with the following allegations pertaining to the decedent's purported oral contract with plaintiff: "That some time during the latter part of October, 1941, the said Harry J. Roberts applied to the plaintiff to leave her place of employment and devote her entire time to him in the continuance of the services above stated; that said decedent stated that he was fond of the plaintiff, honest, and that he became accustomed to the care and attention that she gave him; that he did not want to lose the care, and applied to the plaintiff whether not to choose any friends, but to be his companion and devote all of her time to him."

"That in consideration of said plaintiff complying with the request of the said decedent as aforesaid, he agreed orally that he would devise and bequeath to the plaintiff by his last will and Testament all of his property of which he would die seized and possessed, which at the time, he stated consisted of personal property valued at approximately seven thousand dollars (\$7,000.00).

"That in compliance with said agreement, said plaintiff during the said latter part of October, 1941, testified from

her said position and devoted her time and services exclusively to the said decedent; that also in compliance with said agreement she did not seek the companionship and friendship of others; that said performance continued until the sudden death of the said Harry J. Roberts on the 16th day of March, 1942; that at said time plaintiff herein was forty-six years of age."

Defendant's answer denied the material allegations of the amended complaint.

Harry J. Roberts' wife died in 1935 and he died suddenly from a heart attack on March 16, 1942. He was about 73 years old when he died and at that time plaintiff was about 46 years old. He died intestate and left no known heirs or next of kin. The public administrator was appointed to administer his estate which consisted entirely of personal property valued at approximately \$7,000.

The only witness called by plaintiff in her attempt to prove the oral contract alleged to have been made with her by the decedent in October, 1941, was Thomas J. Keegan. He testified in substance that he knew Harry J. Roberts for approximately 8 years prior to his death; that he knew plaintiff 5 or 6 years and that Roberts had introduced her to him; that he was a friend of Roberts and saw him two or three times a week during the two or three years before he died; that Roberts lived in an apartment on Oakdale avenue for two years prior to his death and before that he lived in an apartment on Barry avenue; that he visited the decedent in his home "at both places *** evenings, mostly" during the three or four years prior to his death and that plaintiff was usually there when he made such visits; that "she took care of his home, such as cleaning it up, washing curtains, everything in general housekeeping work, or cooking on her days off and evenings"; that he had diabetes and "his toe was taken off *** because of gangrene"; that in October, 1941 in

her said location and I voted her time and services exclusively to the said location; that also in compliance with said agreement she did not seek the companionship and friendship of others; that said performance continued until the sudden death of the said Mary J. Roberts on the 1st day of March, 1942; that at said time plaintiff therein was a forty-six year old female.

That plaintiff thereafter learned the material allegations of the said complaint. That Mary J. Roberts died in 1942 and he died suddenly from a heart attack on March 10, 1942. He was about 75 years old when he died and at that time plaintiff was about 40 years old. He died intestate and left no known heirs or next of kin. The said administrator was appointed to administer his estate which consisted entirely of personal property valued at approximately \$7,000.

The only witness called by plaintiff in her attempt to prove the oral contract alleged to have been made with her by the decedent in October, 1941, was Thomas J. Roberts. He testified in substance that he knew Mary J. Roberts for approximately 8 years prior to his death; that he knew plaintiff for 6 years and that Roberts had introduced her to him; that he was a friend of Roberts and saw him two or three times a week during the two or three years before he died; that Roberts lived in an apartment on Oakdale Avenue for two years prior to his death and before that he lived in an apartment on Barry Avenue; that he visited the decedent in his home "at both places" on evenings, mostly "during the time or four years prior to his death and that plaintiff was usually there when he made such visits; that "she took care of his home, such as cleaning it up, washing, etc., everything in general housekeeping work or cooking on her days off and evenings"; that he had diabetes and "this too was taken off" because of "angers"; that in October, 1941, in

the decedent's home on Oakdale avenue "he [Roberts] *** asked Miss Bidwell to quit her position at that time, that he was dependent on her, that he could not get along without her. He says, 'I have not paid you anything,' or 'you have never accepted anything.' But, he said, 'I have approximately seven thousand dollars and I will make out a will and leave that to you;'" that Miss Bidwell said nothing at that time - "she did not enter into the conversation"; that after that time "she continued right on giving him attention *** I have seen her do everything around the household"; that he saw plaintiff on numerous occasions take care of Roberts and she took care of his clothing and washing and cooked for him and that he never saw anyone else take care of him; that "lots and lots of times he [Roberts] would say he would not know what to do without Miss Bidwell, because he had nobody else to take care of him, and nobody else that he could depend on *** I definitely know she would drop in every night from her work"; and that "plaintiff was employed during the daytime" but "after that" she quit her work and "stayed constantly with Mr. Roberts until he died." He also testified that Roberts told him "he never paid her a penny *** outside of making a will giving everything to her."

Keegan testified on cross-examination that plaintiff was employed by the "Board of Health" from the time he first met her and that he thought she quit her job "two or three months previous to his [Roberts'] death."

John A. Filpi testified in plaintiff's behalf that he was an attorney at law, that he had represented the decedent previously and that Roberts came to his office on March 14, 1942 accompanied by Miss Bidwell. In so far as it is pertinent, the balance of his testimony is as follows: "He [Roberts] said, 'I want you to make out a will for me *** I want every-

the decedent's home on Oakdale Avenue "the [Robert] was asked
Miss Bissell to wait her husband at that time, that he was
dependent on her, that he could not get along without her. He
says, 'I have not said you anything,' or 'you have never
accepted anything.' But, in fact, 'I have approximately
seven thousand dollars and I will make out a bill and leave
that to you.' That Miss Bissell said nothing at that time -
"she did not enter into the conversation"; that after that
time "she continued right on being in a situation as I have
seen her do at other times in the hospital"; that he saw
plaintiff on a number of occasions, the case of Roberts and she
took care of his clothing and washing and looked after him and
that he never saw anyone else take care of him; that "last
and lots of times he [Roberts] would say he would not know
what to do without Miss Bissell, because he had nobody else to
take care of him, and nobody else that he could depend on";
I definitely knew the world was not in every way from her work";
and that "plaintiff was employed during the daytime" but "after
that" she did not work and stayed consistently with Mr. Roberts
until he died. It also testified that Roberts told him he
never paid her a penny, and outside of making a will giving
everything to her."
[Robert] testified on cross-examination that plaintiff
was employed by the "Board of Health" from the time he first
got her and that he thought she did not get two or three
months' pay for his [Roberts] death."
John A. Wright testified in plaintiff's behalf that he
was an attorney at law, that he had represented the decedent
previously and that Roberts came to his office on March 14,
1942 accompanied by Miss Bissell. In so far as it is pertinent,
the balance of his testimony is as follows: He [Roberts]
said, 'I want you to make out a will for me *** I want every-

thing which I possess given to Miss Bidwell. *** He said he had asked her to give up her job a couple of months before this date *** that they had an 'understanding' *** if she would stay home, that is at his apartment, to provide for him, that is to take care of him and give up her job, etc., and give her entire time to his care because he could not get around *** and he said if she would do that, he would give everything he had in his possession to her; he would make a will to that effect, and he said he was carrying out his part of the agreement because she had quit her job and was taking care of him *** I told them I would prepare the will and asked him when he would come down and sign it. He said, 'I will be down sometime next week or I will call you first.' *** The following Monday, I think it was the 16th of March. I was getting ready to dictate to my secretary, and I had neglected at that time to ask him whom he wanted as executor. I assumed he wanted Miss Bidwell, but I wanted him to verify it; and when I called, I found out he had died that morning."

Dr. Samuel Axelrod and Dr. Theodore Mousakeotis also testified in plaintiff's behalf. Dr. Axelrod testified that during July and August, 1941, Roberts made ten visits to his office to be treated for a diabetic condition and that plaintiff accompanied him on some of these visits. Dr. Mousakeotis testified as to plaintiff's physical condition in January, 1944, nearly two years after Roberts' death. Inasmuch as the testimony of these doctors has not the slightest bearing on the question as to whether plaintiff and the decedent entered into the alleged oral contract, it is unnecessary to consider it.

Plaintiff testified in rebuttal as to the contents of a letter which she had received from a niece of the decedent's wife but since her testimony in this regard has no material

thing which I possess given to Miss Biddle. He said he had asked her to give up her job a couple of months before this date and that they had an understanding, and if she would stay home, that is at his apartment, to provide for him, that is to take care of him and give up her job, etc., and give her entire time to his care because he could not get around *** and he said if she would do that, he could give everything he had in his possession to her; he would make a will to that effect, and he said he was carrying out his part of the agreement because she had quit her job and was taking care of him. I told them I would prepare the will and asked him when he would come down and sign it. He said, 'I will be down sometime next week or I will call you first.' *** The following Monday, I think it was the 16th of March, I was getting ready to dictate to my secretary, and I had neglected at that time to ask him when he wanted an executor. I assumed he wanted Miss Biddle, but I wanted him to verify it; and when I called, I found out he had died that morning."

Dr. Samuel Corbin and Dr. Theodore Kouschewski also testified in plaintiff's behalf. Dr. Corbin testified that during July and August, 1941, Roberts made ten visits to his office to be treated for a diabetic condition and that plaintiff accompanied him on some of these visits. Dr. Kouschewski testified as to plaintiff's physical condition in January, 1941, nearly two years after Roberts' death. Inasmuch as the testimony of these doctors was not the slightest bearing on the question as to whether plaintiff and the decedent entered into the alleged oral contract, it is unnecessary to consider it.

Plaintiff testified in rebuttal as to the contents of a letter which she had received from a niece of the decedent's wife but since her testimony in this regard has no material

bearing on the alleged oral contract, there is no necessity for reciting or considering it.

It also appeared from the evidence that, although Roberts was suffering from diabetes for three or four years before he died, he was not an invalid during that period; that he was on a diet and taking insulin to control his diabetic condition; that he was not confined to bed during said period except when his toe was amputated and possibly on a few other occasions; that he led a fairly active life; that he visited his friends, took walks and attended moving picture shows and other forms of entertainment; that he was able most of the time to do his own housework and cook his meals if he cared to do so; that he frequently went out to restaurants for his ~~own~~ meals; that he purchased a rooming house about a month before he died and that he and plaintiff were apparently operating same; that he had requested Keegan to help him move some furniture in the rooming house the morning he died; and that he died suddenly from heart disease that morning after he had chased some children "down the street" because they had torn down a sign from in front of the rooming house.

A number of witnesses were called in defendant's behalf but in the view we take of this case it is unnecessary to consider any of defendant's evidence except a letter received by him from Dr. Herman N. Bundesen, President of the Board of Health of the City of Chicago, which stated in part as follows: "In reply to your recent letter regarding Miss. Noreen Bidwell (Estate of Harry J. Roberts) please be advised that she was not an employe of the Health Department. She was employed by the Work Projects Administration and merely assigned to this office on a project from October 10, 1941, to February 11, 1942."

The law is settled in this state that a person may make

hearing on the alleged oral contract, there is no necessity for resting or considering it.

It also appeared from the evidence that, although

Roberts was suffering from diabetes for three or four years before he died, he was not an invalid during that period;

that he was on a diet and taking insulin to control his diabetic condition; that he was not confined to bed during said

period except when his toe was amputated and possibly on a

few other occasions; that he led a fairly active life; that

he visited his friends, took walks and attended moving picture shows and other forms of entertainment; that he was able most

of the time to do his own house work and cook his meals if he

chose to do so; that he frequently went out to restaurants

for his meals; that he purchased a rooming house about a

month before he died and that he and plaintiff were apparently

operating same; that he had requested Keegan to help him move

some furniture in the rooming house the morning he died; and

that he died suddenly from heart disease that morning after

he had chased some children "down the street" because they

had torn down a sign from in front of the rooming house.

A number of witnesses were called in defendant's behalf

but in the view we take of this case it is unnecessary to con-

sider any of defendant's evidence except a letter received by

him from Dr. Herman M. Hurdman, President of the Board of

Health of the City of Chicago, which stated in part as

follows: "In reply to your recent letter regarding Mrs.

Noreen Bidwell (Estate of Henry J. Roberts) please be advised

that she was not an employee of the Health Department. She

was employed by the Work Projects Administration and merely

assigned to this office on a project from October 10, 1941,

to February 11, 1942."

The law is settled in this state that a person may make

a valid oral contract binding himself legally to make a particular disposition of his property by last will and testament and that a court of equity will decree the specific performance of such a contract. (Whitson v. Whitson, 179 Ill. 32.) The law is also well settled that "courts of equity accept with caution evidence offered in support of a contract to make disposition of the property of a deceased person different from that provided by law and will weigh the evidence scrupulously," that "the contract must be reasonably certain as to the terms and the subject matter" and that "the evidence must be clear, explicit and convincing." Yager v. Lyon, 337 Ill. 271.

It will be noted that the theory of plaintiff's complaint was that in consideration of her leaving her employment in October 1941 and devoting her entire time thereafter to Roberts "he would devise and bequeath" to her "by his Last Will and Testament all of his property" of the approximate value of \$7000; and that she fully performed the oral contract on her part by resigning from her position in the latter part of October 1941 and thereafter devoting her time and services exclusively to Roberts until his death on March 16, 1942.

We are convinced from a careful analysis of the evidence that the real question presented for our determination is not whether the order dismissing plaintiff's amended complaint for want of equity was against the manifest weight of the evidence but whether plaintiff proved the essential elements of her cause of action as alleged in her complaint.

It will be recalled that Keegan was the only witness who testified concerning the oral contract alleged to have been made between decedent and plaintiff in October 1941. According to Keegan, plaintiff stood mute and did not indicate

-7-

a valid oral contract binding himself legally to make a particular disposition of his property by last will and testament and that a court of equity will decree the specific performance of such a contract. (Wright v. Wright, 179 Ill. 32.) The law is also well settled that "courts of equity except with caution evidence offered in support of a contract to make a disposition of the property of a deceased person different from that provided by law and will weigh the evidence reasonably," that "the contract must be reasonably certain as to the terms and the subject matter" and that "the evidence must be clear, explicit and convincing." Yates v. Yates, 337 Ill. 371.

It will be noted that the theory of Plaintiff's complaint was that in consideration of her leaving her employment in October 1941 and devoting her entire time thereafter to Roberts "he would advise and bequeath" to her "by his last will and testament all of his property" of the approximate value of \$7000; and that she fully performed the oral contract on her part by remaining from her position in the latter part of October 1941 and thereafter devoting her time and services exclusively to Roberts until his death on March 16, 1942.

We are convinced from a careful analysis of the evidence that the real question presented for our determination is not whether the oral dispositive Plaintiff's alleged complaint for want of equity was against the manifest weight of the evidence but whether Plaintiff proved the essential elements of her cause of action as alleged in her complaint. It will be recalled that Logan was the only witness who testified concerning the oral contract alleged to have been made between deceased and Plaintiff in October 1941. According to Logan, Plaintiff stood mute and did not indicate

in any manner that she accepted the decedent's alleged proposal to make a will in her favor if she would quit her position in October 1941 and devote her entire time thereafter to caring for him. The decedent's unaccepted proposal certainly did not constitute a contract. However, even if it be assumed that plaintiff did accept such proposal and that she and the decedent thereby entered into the alleged oral contract, that fact alone would not entitle her to the relief sought. As an essential element of her cause of action she was required to and did allege full performance of her obligation under the terms of the oral contract. It was incumbent upon plaintiff to prove this essential element of her cause of action by clear and conclusive evidence. As has been seen, the sole consideration upon which the decedent made his offer to plaintiff in October 1941 to make a will in her favor was that she resign from her position at that time so that she could devote her entire time to caring for him. While it was alleged in the amended complaint that "in compliance with said agreement said plaintiff during the said latter part of October 1941 resigned from her said position and devoted her time and services exclusively to the decedent," not **only** did the evidence fail to prove that she complied with her alleged agreement with Roberts but the testimony of her own witnesses, Keegan and Attorney Filpi, showed that she did not resign from her position until several months after October 1941. According to Keegan, she quit her job "two or three months" prior to Roberts' death on March 16, 1942 and, according to Attorney Filpi, the decedent told him that "he had asked her to give up her job a couple of months" prior to March 14, 1942. According to the letter of Dr. Bundesen, the records of the Board of Health of the City of Chicago showed that she was employed on a WPA project in the office of said Board until February 11, 1942. Therefore it clearly appears that there was a total

in my opinion that she accepted the decedent's alleged proposal to make a will in her favor if she could quit her position in October 1941 and devote her entire time thereafter to caring for him. The decedent's unaccepted proposal certainly did not constitute a contract. However, even if it be assumed that plaintiff did accept such proposal and that she and the decedent thereby entered into the alleged oral contract, that fact alone would not entitle her to the relief sought. It is essential element of her cause of action she was required to and did allege full performance of her obligation under the terms of the oral contract. It was incumbent upon plaintiff to prove this essential element of her cause of action by clear and convincing evidence. As has been seen, the sole consideration upon which the decedent made his offer to plaintiff in October 1941 to make a will in her favor was that she resign from her position at that time so that she could devote her entire time to caring for him. While it was alleged in the amended complaint that "in compliance with said agreement said plaintiff during the said latter part of October 1941 resigned from her said position and devoted her time and services exclusively to the decedent," not only did the evidence fail to prove that she complied with her alleged agreement with Roberts but the testimony of her own witnesses, Logan and Attorney Wright, showed that she did not resign from her position until several months after October 1941. According to Logan, she quit her job "two or three months" prior to Roberts' death on March 10, 1942 and, according to Attorney Wright, the decedent told him that "he had asked her to give up her job a couple of months" prior to March 14, 1942. According to the letter of Dr. Johnson, the records of the Board of Health of the City of Chicago showed that she was employed on a full project in the office of said Board until February 11, 1942. Therefore it clearly appears that there was a total

failure of consideration on plaintiff's part for Roberts' purported promise to make a will in her favor, since she did not resign from her position in October 1941 as she was obligated to do under the alleged oral contract. Having failed to prove compliance on her part with the terms of said oral contract, which was one of the essential elements of her cause of action, plaintiff is precluded from recovery as a matter of law.

Even though Attorney Filpi's testimony tended to show that Roberts requested him to make a will for him in favor of plaintiff in fulfillment of what he considered his obligation under an oral contract made with her "a couple of months" before he died, such testimony could not possibly be of any avail to plaintiff, since it does not tend to prove the existence of the oral contract alleged in the amended complaint or that plaintiff resigned from her position in October, 1941 as she was obligated to do under said contract. The rule is well established that a party to a suit, either at law or equity, cannot have relief under proofs without allegations, nor under allegations without proof in support thereof.

(Leitch v. Sanitary Dist. of Chicago, 386 Ill. 433.) It is elemental that where a plaintiff fails to prove the cause of action made by his complaint he is not entitled to recover, although the facts actually proved would have entitled him to relief had his bill been framed upon a different theory.

(Oetting v. Graham, 373 Ill. 247.) The rule that proofs without corresponding allegations are in equity as unavailing as allegations without proofs is familiar to every lawyer.

(Angelo v. Angelo, 146 Ill. 629.) Not only has plaintiff failed to prove her alleged cause of action by clear, convincing ~~and~~ and conclusive evidence but she has failed

failure of consideration on plaintiff's part for Roberts' promise to make a will in her favor, since she did not resign from her position in October 1941 as she was obligated to do under the alleged oral contract. Having failed to prove compliance on her part with the terms of said oral contract, which was one of the essential elements of her cause of action, plaintiff is precluded from recovery as a matter of law.

Even though plaintiff's testimony tended to show that Roberts requested him to make a will for him in favor of plaintiff in fulfillment of what he considered his obligation under an oral contract made with her "a couple of months" before he died, such testimony could not possibly be of any avail to plaintiff, since it does not tend to prove the existence of the oral contract alleged in the amended complaint on that plaintiff resigned from her position in October, 1941 as she was obligated to do under said contract. The rule is well established that a party to a suit, either at law or equity, cannot have relief under proofs without allegations, nor under allegations without proof in support thereof.

(Heister v. City of Chicago, 386 Ill. 433.) It is elemental that where a plaintiff fails to prove the cause of action made by his complaint he is not entitled to recover, although the facts actually proved would have entitled him to relief had his claim been framed upon a different theory. (Gottling v. Graham, 373 Ill. 247.) The rule that proofs without corresponding allegations are in equity as unavailing as allegations without proofs is familiar to every lawyer. (Amelio v. Amelio, 146 Ill. 629.) Not only has plaintiff failed to prove her alleged cause of action by clear, convincing evidence and conclusive evidence but she has failed

to make out a prima facie case.

Plaintiff has suggested some other points which in our opinion do not merit serious consideration and we therefore deem it unnecessary to discuss them.

We are impelled to hold that the trial court did not err in sustaining defendant's exceptions to the master's report and ~~in~~ dismissing plaintiff's amended complaint for want of equity.

For the reasons stated herein the decree or order of the Circuit court of Cook County is affirmed.

AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

to make out a prima facie case.
Plaintiff has suggested some other points which in
our opinion do not merit serious consideration and we there-
fore deem it unnecessary to discuss them.
We are inclined to hold that the trial court did not
err in sustaining defendant's exceptions to the master's
report and in dismissing plaintiff's amended complaint for
want of equity.

For the reasons stated herein the decree or order
of the Circuit Court of Cook County is affirmed.
JULIUS.

Witness my hand and seal of said Court at Chicago, Illinois, this 1st day of June, 1906.

43489

DR. IRVING ROTHENBERG,
Appellee,

v.

ELIZABETH KAISER,
Appellant.

371 A
} APPEAL FROM MUNICIPAL
} COURT OF CHICAGO.
} 329 I.A. 1831

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought in the Municipal court of Chicago by Dr. Irving Rothenberg against Elizabeth Kaiser to recover for damages to plaintiff's automobile which resulted from a collision between it and defendant's car at the intersection of Kimball avenue and Ainslie street in Chicago, Illinois. The case was tried without a jury. The trial court found the defendant guilty and assessed plaintiff's damages at \$1,086.04. Judgment was entered on the finding and defendant appeals.

The statement of claim consisted of two counts. The first count charged negligence generally and the second count charged wilful and wanton conduct generally.

Dr. Hardin, the driver of plaintiff's car, and the defendant, Elizabeth Kaiser, were the only eyewitnesses to the collision who testified. Dr. Hardin testified in substance that at about 10 A. M. on February 9, 1944 he was driving plaintiff's Chrysler car west on Ainslie street at a speed of 25 miles per hour; that as he approached Kimball avenue he stopped at the stop sign which is on the north side of Ainslie street about 10 feet east of the east curb of Kimball avenue; that there was a building on the northeast corner of Ainslie street and Kimball avenue which "comes right up to the sidewalk line and it comes up close to the street"; that it was a sunny day, the pavement was dry and the visibility was good; that after he stopped at

dry and the visibility was good; that after he stopped at
 to the street"; that it was a sunny day, the pavement was
 comes right up to the sidewalk line and it comes up close
 northeast corner of Ainslie street and Kimball avenue which
 curb of Kimball avenue; that there was a building on the
 north side of Ainslie street about 10 feet east of the east
 Kimball avenue he stopped at the stop sign which is on the
 at a speed of 25 miles per hour; that as he approached

driving plaintiff's Chrysler car west on Ainslie street
 stance that at about 10 A. M. on February 2, 1944 he was
 the collision who testified. Dr. Hardin testified in sup-
 defendant, Elizabeth Kaiser, were the only eyewitnesses to
 count charged willful and wanton conduct generally.

The first count charged negligence generally and the second
 count consisted of two counts.

on the finding and defendant appeals.
 plaintiff's damages of \$1,086.04. Judgment was entered
 The trial court found the defendant guilty and assessed
 in Chicago, Illinois. The case was tried without a jury.
 at the intersection of Kimball avenue and Ainslie street
 resulted from a collision between it and defendant's car
 to recover for damages to plaintiff's automobile which
 Chicago by Dr. Irving Rothman against Elizabeth Kaiser
 This action was brought in the Municipal court of
 MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Appellant, ELIZABETH KAISER,
 v.
 Appellee, DR. IRVING ROTHMAN,
 43489

323 I.A. 185
 COURT OF CHICAGO.
 APPEAL FROM MUNICIPAL

578

the stop sign he proceeded to cross Kimball avenue; that he could not observe traffic proceeding south and north on Kimball avenue from where he had stopped; that when the front end of his car "was 10 feet out into the intersection" he saw defendant coming "over 100 feet up Kimball Avenue" from the north; that he was unable to judge the speed of defendant's car but he thought that she would stop; that he saw her coming across the street; that immediately prior to the impact he swerved his car to the south but she ran into him; that he did not know whether defendant made any attempt to stop; that he was past the middle line of Kimball avenue when the front end of defendant's car hit the middle and rear end of plaintiff's car; that plaintiff's car was a large Chrysler and defendant was driving a Chevrolet coupe; and that after the impact his car turned over on its top on the sidewalk on the southwest corner of the intersection.

Dr. Hardin testified on cross-examination that there were signs controlling east and west traffic on Ainslie street at Kimball avenue but that there were no such signs controlling north and south traffic on Kimball avenue; that the accident happened at about 9 or 9:30 in the morning; that he was going from 20 to 25 miles an hour at the time of the impact; that Kimball avenue is a four lane highway from 60 to 75 feet wide from curb to curb and that Ainslie street is not over 30 feet wide; that he stopped at the stop sign which was 10 feet east of the east curb of Kimball avenue, with the front end of his car opposite said sign; that he could not see north from where he stopped and that without looking north he proceeded out into the intersection; that when he got out into the intersection about 10 feet he could see defendant's car coming; that he could not see to the north until he got 10 feet out into the

the stop sign he proceeded to cross Kimball Avenue; that he could not observe traffic proceeding south and north on Kimball Avenue from where he had stopped; that when the front end of his car "was 10 feet out into the intersection" he saw defendant coming "over 100 feet up Kimball Avenue" from the north; that he was unable to judge the speed of defendant's car but he thought that she would stop; that he saw her coming across the street; that immediately prior to the impact he swerved his car to the south but she ran into him; that he did not know whether defendant made any attempt to stop; that he was past the middle line of Kimball Avenue when the front end of defendant's car hit the middle and rear end of plaintiff's car; that plaintiff's car was a large Chrysler and defendant was driving a Chevrolet coupe; and that after the impact his car turned over on its top on the sidewalk on the southwest corner of the intersection.

Dr. Martin testified on cross-examination that there were signs controlling east and west traffic on Alameda street at Kimball Avenue but that there were no such signs controlling north and south traffic on Kimball Avenue; that the accident happened at about 9 or 9:30 in the morning; that he was going from 20 to 25 miles an hour at the time of the impact; that Kimball Avenue is a four lane highway from 60 to 75 feet wide from curb to curb and that Alameda street is not over 30 feet wide; that he stopped at the stop sign which was 10 feet east of the east curb of Kimball Avenue, with the front end of his car opposite said sign; that he could not see north from where he stopped and that without looking north he proceeded out into the intersection; that when he got out into the intersection about 10 feet he could see defendant's car coming; that he could not see to the north until he got 10 feet out into the

street because the building was in his way; that he could not see north on Kimball avenue from where the stop sign was; that when he saw defendant's car he thought he had plenty of time to cross; that after the accident his car proceeded 20 or 30 feet in a southwesterly direction and then hit the curb beyond the sidewalk on the west side of Kimball avenue and rolled over; that at the time of the accident defendant's car was approaching from his right and he was approaching defendant's car from her left; that he had been over this intersection a number of times and knew that there was a stop sign controlling traffic going west on Ainslie street across Kimball avenue; and that there wasn't anybody on the street at the time except defendant and himself.

Defendant, Elizabeth Kaiser, called as an adverse witness by plaintiff, testified that she was a nurse employed at Bethany Hospital which is located at Homan avenue and Van Buren street; that at the time of the accident she was driving her 1940 Chevrolet coupe to work, where she was to report at 10:30 A. M.; that she was driving at a speed of from 20 to 25 miles per hour south on Kimball avenue; that as she approached the intersection she looked to the left on Ainslie street and did not see any car approaching; that she then looked to the right and there were no cars coming from the west; that she looked back to the left again and saw plaintiff's car coming across the intersection rather fast and slammed on her brakes; that when she put on her brakes she was going into the intersection and was on the west side of Kimball avenue; that as she entered the intersection the other car was in the east half of Kimball avenue and had not passed the center line thereof; that "she would say she could stop within 6 or 8 feet at the speed she was going;" that she did not turn or swerve her car at any time before the impact and that her car ^{was} hit on the left front

street because the building was in his way; that he could not see north on Kimball Avenue from where the stop sign was; that when he saw defendant's car he thought he had plenty of time to cross; that after the accident his car proceeded 20 or 30 feet in a southeasterly direction and then hit the curb beyond the sidewalk on the west side of Kimball Avenue and rolled over; that at the time of the accident defendant's car was approaching from his right and he was approaching defendant's car from her left; that he had been over this intersection a number of times and knew that there was a stop sign controlling traffic going west on Alameda Street across Kimball Avenue; and that there wasn't anybody on the street at the time except defendant and himself.

Defendant, Elizabeth Kaiser, called as an adverse witness by plaintiff, testified that she was a nurse employed at Bethany Hospital which is located at Norman Avenue and Van Buren Street; that at the time of the accident she was driving her 1940 Chevrolet coupe to work, where she was to report at 10:30 A. M.; that she was driving at a speed of from 20 to 25 miles per hour south on Kimball Avenue; that as she approached the intersection she looked to the left on Alameda Street and did not see any car approaching; that she then looked to the right and there were no cars coming from the west; that she looked back to the left again and saw plaintiff's car coming across the intersection rather fast and slammed on her brakes; that when she put on her brakes she was going into the intersection and was on the west side of Kimball Avenue; that as she entered the intersection the other car was in the east half of Kimball Avenue and had not passed the center line thereof; that she would say she could stop within 6 or 8 feet at the speed she was going; that she did not turn or swerve her car at any time before the impact and that her car hit on the left front

side and plaintiff's car was also hit on the left front side; that when she looked to the left as she approached the intersection she saw nothing at the stop sign at the northeast corner; that she looked to the right and back to the left during which an interval of 15 to 20 seconds elapsed; that when she looked to the left the second time she saw plaintiff's car; that it was going fast in the intersection; that she estimated the speed at about 30 miles per hour; that the front of her car was badly damaged, the bumper, left fender, hood, grille and radiator were pushed to the right - hit on the left and pushed to the right - and that the bumper of her car with reference to the midline of Ainslie street was at least half way north of such line; that the speed posted along Kimball avenue, where the accident happened, was 25 miles per hour; that as she looked to the left before the accident she saw the stop sign on the northeast corner; and that she saw that there was no car parked there and that if there had been a car parked there she would have seen it.

Defendant testified on cross-examination that she did not recall that there were any cars parked on any of the four corners; that she was just entering the intersection when she first observed plaintiff's car coming into the intersection; that at that point the thought struck her that there would be a collision because the other driver seemed very intent on getting across and that she slammed on her brakes; and that she stopped at the place of impact, which was in the northwest "corner" of the intersection.

Plaintiff, Dr. Irving Rothenberg, did not see the accident and merely testified as to the damage done to his car.

Edward G. Carlson testified in plaintiff's behalf that he arrived at the scene of the accident five or ten minutes after it happened; that he saw plaintiff's car "sitting on its

side and Plaintiff's car was also hit on the left front side; that when she looked to the left as she approached the intersection she saw nothing at the stop sign at the northwest corner; that she looked to the right and back to the left during which an interval of 15 to 20 seconds elapsed; that when she looked to the left the second time she saw Plaintiff's car; that it was going fast in the intersection; that she estimated the speed at about 30 miles per hour; that the front of her car was badly damaged, the bumper, left fender, hood, grille and radiator were pushed to the right - hit on the left and pushed to the right - and that the bumper of her car with reference to the middle of Ainslie street was at least half way north of such line; that the speed posted along Kimball avenue, where the accident happened, was 25 miles per hour; that as she looked to the left before the accident she saw the stop sign on the northwest corner; and that she saw that there was no car parked there and that it there had been a car parked there she would have seen it.

Defendant testified on cross-examination that she did not recall that there were any cars parked on any of the four corners; that she was just entering the intersection when she first observed Plaintiff's car coming into the intersection; that at that point she thought struck her that there would be a collision because the other driver seemed very intent on getting across and that she slipped on her brakes; and that she stopped at the place of impact, which was in the northwest corner of the intersection.

Plaintiff, Dr. Irving Potenberg, did not see the accident and merely testified as to the damage done to his car.

Edward C. Olson testified in Plaintiff's behalf that he arrived at the scene of the accident five or ten minutes after it happened; that he saw Plaintiff's car "sitting on its

roof" and that defendant's car was very close to the northwest corner near the center line of both streets; that he observed skid marks on the street "about a foot and a half to two feet long just previous to where the defendant's car had stopped"; that defendant's car "was standing" and its bumper, front fender, grille and radiator were pushed back; and that plaintiff's car was turned upside down.

Carlson testified on cross-examination that he was well acquainted with the intersection of Ainslie street and Kimball avenue; that the stop sign on Ainslie street at the northeast corner of the intersection was seven feet east of the east sidewalk of Kimball avenue; that the west side of the building on the northeast corner of Ainslie street and Kimball avenue was about four feet east of the stop sign.

Defendant offered in evidence three photographs which were identified by her and plaintiff's witness Carlson as correctly portraying the scene of the accident at the time it occurred and particularly the location of the building at the northeast corner of Ainslie street and Kimball avenue and the stop sign on the north side of Ainslie street where the driver of plaintiff's car testified he stopped before entering the intersection and which he said was about 10 feet east of the east curb of Kimball avenue. Plaintiff objected to the admission of these photographs and the trial judge said: "I could not let the picture go in, because the party who took the pictures has not testified, the party who has had * * * the film in his possession from the time he took the picture until the picture was developed, has not testified. For that reason I cannot let them go in."

A discussion followed during the course of which the following occurred: "THE COURT: Personally I don't see any objection to letting them in. Technically, yes * * *."

and that defendant's car was very close to the north-
west corner near the center line of both streets; that he
observed skid marks on the street "about a foot and a half
to two feet long just previous to where the defendant's car
had stopped"; that defendant's car "was standing" and its
wiper, front fender, grille and radiator were pushed back;
and that plaintiff's car was turned upside down.

Carlson testified on cross-examination that he was
well acquainted with the intersection of Alameda street and
Kimball avenue; that the stop sign on Alameda street at the
northeast corner of the intersection was seven feet east of
the east sidewalk of Kimball avenue; that the west side of
the building on the northeast corner of Alameda street and
Kimball avenue was about four feet east of the stop sign.

Defendant offered in evidence three photographs
which were identified by her and plaintiff's witness Carlson

as correctly portraying the scene of the accident at the
time it occurred and particularly the location of the building
at the northeast corner of Alameda street and Kimball avenue
and the stop sign on the north side of Alameda street where
the driver of plaintiff's car testified he stopped before

entering the intersection and which he said was about 10
feet east of the east curb of Kimball avenue. Plaintiff ob-

jected to the admission of these photographs and the trial
judge said: "I could not let the picture go in, because the
party who took the pictures has not testified, the party who
has had * * * the film in his possession from the time he
took the picture until the picture was developed, has not
testified. For that reason I cannot let them go in."

A discussion followed during the course of which the
following occurred: "THE COURT: Personally I don't see any
objection to letting them in. Technically, yes * * *."

MR. HAMPTON: Only for the purpose of the Court seeing where this accident happened. THE COURT: It won't influence the decision of the Court, anyway, I will tell you that. MR.

ABRAMS: Under the circumstances I will let them in." Thereupon the photographs were received in evidence.

Defendant contends that "the court committed reversible error in refusing to consider the photographs. Photographs are proper evidence when they are verified by proof that they are true representations of the subject matter."

Since the photographs were properly identified as correctly portraying conditions which existed as the drivers of the respective cars approached and entered the intersection where the accident occurred, there can be no question as to their competency and admissibility. In Terry v. City of Chicago, 320 Ill. App. 342, the defendant offered and the court received in evidence a photograph showing a sidewalk at the place of the accident. After a verdict had been returned in favor of the defendant, the court granted a new trial for the reason that there had been no evidence as to the time when the picture was taken. Upon appeal, this court reversed the order allowing plaintiff's motion for a new trial and directed the trial court to enter judgment on the verdict, saying at p. 344:

"The only point made by counsel for the city is that the photograph was properly admitted in evidence. When plaintiff and another witness were shown this photograph before it was offered in evidence they testified in substance that it correctly represented the condition of the sidewalk at the time of the accident. In this circumstance, obviously, it was admissible in evidence regardless of when it was taken."

Since Dr. Hardin testified that when he stopped at the stop sign he "could not see to the north because the building was in the way" and that he could not see north on Kimball avenue until the front end of his car reached a point 10 feet within the intersection because the building on the northeast

MR. HAMPTON: Only for the purpose of the Court seeing where this accident happened. THE COURT: It won't influence the decision of the Court, anyway, I will tell you that, MR. ABBAS: Under the circumstances I will let them in. There- upon the photographs were received in evidence.

Defendant contends that "the court committed reversible error in refusing to consider the photographs. Photographs are proper evidence when they are verified by proof that they are true representations of the subject matter."

Since the photographs were properly identified as correctly portraying conditions which existed as the drivers of the respective cars approached and entered the intersection where the accident occurred, there can be no question as to their competency and admissibility. In Terry v. City of Chicago, 320 Ill. App. 342, the defendant offered and the court received in evidence a photograph showing a sidewalk at the place of the accident. After a verdict had been returned in favor of the defendant, the court granted a new trial for the reason that there had been no evidence as to the time when the picture was taken. Upon appeal, this court reversed the order allowing plaintiff's motion for a new trial and directed the trial court to enter judgment on the verdict, saying at p. 344:

"The only point made by counsel for the city is that the photograph was properly admitted in evidence. When plaintiff and another witness were shown this photograph before it was offered in evidence they testified in substance that it correctly represented the condition of the sidewalk at the time of the accident. In this circumstance, obviously, it was admissible in evidence regardless of when it was taken."

Since Dr. Hardin testified that when he stopped at the stop sign he "could not see to the north because the building was in the way" and that he could not see north on Kimball avenue until the front end of his car reached a point 10 feet within the intersection because the building on the northeast

corner was "in the way," the photographs were not only material but of vital importance, inasmuch as they show that the west side of the building was a considerable distance east of the east sidewalk of Kimball avenue and also several feet east of the stop sign on Ainslie street. They further show that the view for a considerable distance to the north on Kimball avenue of a person driving a car which had stopped at the stop sign in question could not have been obstructed by said building. They also show that between the stop sign and the east curb of Kimball avenue there was a clear and unobstructed view of the southbound traffic lanes on Kimball avenue. The photographs completely refute the testimony of plaintiff's driver as to his inability to see north on Kimball avenue because of the building until the front end of his car was 10 feet within the intersection.

In view of the statement of the trial judge that the photographs would not "influence the decision of the Court," even though they were received in evidence, we are impelled to hold that his announced refusal to give them proper consideration constituted reversible error.

Inasmuch as this case will in all likelihood be retried, we refrain from discussing the evidence at length. However, it seems clear from an analysis of the testimony of the witnesses, heretofore set forth, that there is not a particle of evidence in the record which tends to show that defendant was guilty of wilful and wanton conduct.

For the reasons stated herein the judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

corner was "in the way," the photographs were not only
 material but of vital importance, inasmuch as they show
 that the west side of the building was a considerable dis-
 tance east of the east sidewalk of Kimball Avenue and also
 several feet east of the stop sign on Kimball Street. They
 further show that the view for a considerable distance to
 the north on Kimball Avenue of a person driving a car which
 had stopped at the stop sign in question could not have been
 obstructed by said building. They also show that between
 the stop sign and the east curb of Kimball Avenue there was
 a clear and unobstructed view of the surrounding traffic
 lanes on Kimball Avenue. The photographs completely refute
 the testimony of Plaintiff's driver as to his inability to
 see north on Kimball Avenue because of the building until
 the front end of his car was 10 feet within the intersection.
 In view of the statement of the trial judge that the
 photographs would not "influence the decision of the Court,"
 even though they were received in evidence, we are impelled
 to hold that his announced refusal to give them proper con-
 sideration constituted reversible error.

Inasmuch as this case will in all likelihood be re-
 tried, we refrain from discussing the evidence at length.
 However, it seems clear from an analysis of the testimony
 of the witnesses, heretofore set forth, that there is not a
 particle of evidence in the record which tends to show that
 defendant was guilty of willful and wanton conduct.

For the reasons stated herein the judgment of the
 Municipal Court of Chicago is reversed and the cause is re-
 manding for a new trial.

JUDGMENT REVERSED AND CAUSE RE-
 MANDING FOR A NEW TRIAL.

Triana, P. J., and Brennan, J., concur.

43570

RALPH A. TERRELL,
Appellant,

v.

TOOL EQUIPMENT SALES CO.,
a corporation,
Appellee.

372 A
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

329 I.A. 183²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by Ralph A. Terrell to recover from Tool Equipment Sales Co. a balance of \$12,759.34 in commissions which plaintiff claimed defendant owed him. The case was tried by the court without a jury and at the conclusion of plaintiff's evidence the trial court entered judgment against plaintiff on defendant's motion. Plaintiff appeals from said judgment.

Plaintiff's amended complaint alleged in substance that he was employed as a salesman by defendant, which was the sales representative of a number of tool manufacturing companies; that under the terms of his employment he was required to solicit orders for tools to be manufactured by such companies and that on every order procured by him he was entitled to receive one-half of the 10% commission paid to his employer by said tool manufacturers; and that there was due and owing to him a balance of \$12,759.34 for earned commissions on orders secured by him, after allowing defendant certain credits.

The answer to the amended complaint, after admitting plaintiff's employment by defendant as a salesman, alleged substantially that he was paid all commissions due him during the period of his employment except \$3,426.33; that while plaintiff was ostensibly working for defendant, he was also receiving compensation for working for another employer who was one of defendant's customers; that "such conduct was a breach of plaintiff's agreement with defendant, which agreement required plaintiff to devote his

APPEAL FROM SUPERIOR COURT,
COOK COUNTY,

3321 A. 188

RAULPH A. KENNEDY,
Appellant,
v.
TOOL EQUIPMENT CO.,
a corporation,
Respondent.

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This action was brought by Ralph A. Kennedy to recover from Tool Equipment Co. a balance of \$12,759.34 in commissions which plaintiff claimed defendant owed him. The case was tried by the court without a jury and at the conclusion of plaintiff's evidence the trial court entered judgment against plaintiff on defendant's motion. Plaintiff appeals from said judgment.

Plaintiff's amended complaint alleged in substance that he was employed as a salesman by defendant, which was the sales representative of a number of tool manufacturing companies; that under the terms of his employment he was required to solicit orders for tools to be manufactured by such companies and that on every order procured by him he was entitled to receive one-half of the 10% commission paid to his employer by said tool manufacturing companies; and that there was due and owing to him a balance of \$12,759.34 for earned commissions on orders secured by him, after allowing defendant certain credits. The answer to the amended complaint, after admitting plaintiff's employment by defendant as a salesman, alleged substantially that he was paid all commissions due him during the period of his employment except \$3,426.32; that while plaintiff was ostensibly working for defendant, he was also receiving compensation for working for another employer who was one of defendant's customers; that such conduct was a breach of plaintiff's agreement with defendant, which agreement required plaintiff to devote his

entire time to the business of defendant"; and that by reason of such breach plaintiff was not entitled to recover anything from defendant.

Plaintiff's evidence shows that defendant represented as sales agent a number of tool manufacturers, including the Brust Tool Mfg. Co. (hereinafter for convenience referred to as the Brust Company); that the Brust Company entered into a written contract with defendant under the terms of which said company appointed defendant its "Sales Representative" and agreed to pay the latter "a commission of *** 10% *** of the cost of all labor involved in the manufacture of orders" obtained by defendant; and that on January 2, 1939 plaintiff was employed as a salesman by defendant under an oral contract to solicit orders for tools to be produced by the various tool manufacturers represented by defendant but that the only order involved herein was one secured by Terrell from the Studebaker Aviation Company for tools to be manufactured by the Brust Company.

Terrell testified that when he was employed by C. B. Cole, the president of defendant company, "There was nothing said about devoting all of my time to Mr. Cole's business. There was nothing said about that. I didn't understand that I was to devote all of my time to Mr. Cole's business *** nothing was said about how much time I was to spend. It was my understanding and I had in mind that I could spend whatever time I wanted on the transaction ***."

As to the manner in which he customarily performed his duties as defendant's salesman Terrell testified that he called on concerns who were engaged in the manufacture of various products; that it was his business to understand what tool would perform any required operation and "to recommend the type of tool"; that when he called on a customer he would discuss with such customer what tool was required for the operation outlined by the manufacturer; that he would first secure a tentative order and at that time the manufacturer

entire time to the business of defendant; and that by reason of such breach plaintiff was not entitled to recover anything from defendant.

Plaintiff's evidence shows that defendant represented as sales agent a number of tool manufacturers, including the First Tool Mfg. Co. (hereinafter for convenience referred to as the First Company); that the First Company entered into a written contract with defendant under the terms of which said company appointed defendant its "sales representative" and agreed to pay the latter "a commission of *** for *** of the cost of all labor involved in the manufacture of orders" obtained by defendant; and that on January 2, 1939 plaintiff was employed as a salesman by defendant under an oral contract to solicit orders for tools to be produced by the various tool manufacturers represented by defendant but that the only order involved herein was one secured by Terrell from the Studebaker Aviation Company for tools to be manufactured by the First Company.

Terrell testified that when he was employed by C. B. Cole, the president of defendant company, "There was nothing said about devoting all of my time to C. Cole's business. There was nothing said about that. I didn't understand that I was to devote all of my time to C. Cole's business *** nothing was said about how much time I was to spend. It was my understanding and I had in mind that I could spend whatever time I wanted on the transaction ***." As to the matter in which he customarily performed his duties as defendant's salesman Terrell testified that he called on concerns who were engaged in the manufacture of various products; that it was his business to understand what tool would perform any required operation and "to record the type of tool"; that when he called on a customer he would discuss with each customer what tool was required for the operation outlined by the manufacturer; that he would first secure a tentative order and at that time the manufacturer

would deliver to him blue prints and process sheets pertaining to the tools included in the order; that he would take such blue prints and process sheets to the machine shop of the Brust Company and go over them with the Brust Company's engineers and explain to the latter in detail what was required as to each and every item; that the engineering department of said company would then figure the method and steps to be taken to produce the tools or dies specified in the tentative order; that he would then estimate with the Brust Company the cost of the tools and the time it would take to assemble the parts thereof; that defendant did not have any convenient place for plaintiff to work and he did most of his work of estimating the cost of tools at the shop of the Brust Company; that after the engineering work had been performed and the cost arrived at, he would return to the manufacturer for a final order and would discuss each tool with said concern and advise it as to the length of time it would take to produce the tool and the price thereof; that upon securing a final order he would take same back to the Brust Company to have the tool manufactured; that defendant would receive its commission from the Brust Company when the latter had been paid in full by the manufacturer which had ordered the tools; and that under Terrell's agreement with defendant he was paid a commission of 50% of the commission received by defendant from the Brust Company.

Plaintiff's evidence also shows that while he was employed by defendant the latter paid him commissions as follows: \$4600 in 1939; \$6,000 in 1940; \$26,000 in 1941; \$36,000 in 1942 and \$19,000 up to June 1, 1943; and that there was a balance of \$12,759.34 of earned commissions due and owing to him when he resigned from his position with defendant on August 1, 1943.

Plaintiff's evidence as to the particular transaction in question is as follows: In 1941 Terrell secured a \$300,000 order from the Studebaker Aviation Co. for tools to be manufactured by

would deliver to him blue prints and process sheets pertaining to the tools included in the order; that he would take such blue prints and process sheets to the machine shop of the Brust Company and go over them with the Brust Company's engineers and explain to the latter in detail what was required as to each and every item; that the engineering department of said company would then figure the method and steps to be taken to produce the tools or dies specified in the tentative order; that he would then estimate with the Brust Company the cost of the tools and the time it would take to assemble the parts thereof; that defendant did not have any convenient place for plaintiff to work and he did most of his work of estimating the cost of tools at the shop of the Brust Company; that after the engineering work had been performed and the cost arrived at, he would return to the manufacturer for a final order and would discuss each tool with said concern and advise it as to the length of time it would take to produce the tool and the price thereof; that upon securing a final order he would take same back to the Brust Company to have the tool manufactured; that defendant would receive its commission from the Brust Company when the latter had been paid in full by the manufacturer which had ordered the tools; and that under Terrell's agreement with defendant he was paid a commission of 50% of the commission received by defendant from the Brust Company.

Plaintiff's evidence also shows that while he was employed by defendant the latter paid him commissions as follows: \$400 in 1930; \$6,000 in 1940; \$26,000 in 1941; \$36,000 in 1942 and 19,000 up to June 1, 1943; and that there was a balance of \$12,750.34 of earned commissions due and owing to him when he resigned from his position with defendant on August 1, 1943.

Plaintiff's evidence as to the particular transaction in question is as follows: In 1941 Terrell secured a \$30,000 order from the Studebaker Aviation Co. for tools to be manufactured by

the Brust Company. When the Studebaker Company gave plaintiff a tentative order for these tools it delivered to him blue prints thereof and process sheets which showed in detail the various operations the Studebaker Company contemplated performing with such tools in the manufacture of its products. The engineering department of the Studebaker Company necessarily prepared these blue prints and process sheets. After plaintiff took the blue prints and process sheets to the Brust Company so that the latter might design the tools and discussed same with said company's engineers, it was discovered that the process sheets were incorrect in that the operations described therein could not be performed by the tools indicated on the blue prints. Plaintiff took the blue prints and the process sheets back to the Studebaker Company and explained the errors in the process sheets. It was the obligation of the Studebaker Company to have its engineers prepare correct process sheets if it wanted the tools manufactured by the Brust Company. The Studebaker Company was short of engineers and its vice-president asked plaintiff if the Brust Company would do the engineering work necessary to correct the process sheets and he said that he thought it would. When plaintiff returned to the Brust Company and advised its president of the Studebaker Company's predicament and the request of its vice-president that the Brust Company correct the process sheets, the president of the Brust Company said that it had no engineers available to do this work and asked plaintiff if he would do it. Plaintiff agreed to do it and he worked every evening, Saturday afternoons and Sundays for six months in the performance of this engineering work. When plaintiff completed his work in correcting the process sheets the Studebaker Company sent the Brust Company a check for \$28,000 in payment for said work. The Brust Company turned the \$28,000 over to plaintiff without deducting anything

the Trust Company. When the Studebaker Company gave plaintiff a tentative order for these tools it delivered to him nine prints thereof and process sheets which showed in detail the various operations the Studebaker Company contemplated performing with such tools in the manufacture of its products. The engineering department of the Studebaker Company necessarily prepared these nine prints and process sheets. After plaintiff took the nine prints and process sheets to the Trust Company so that the latter might design the tools and discussed same with said company's engineers, it was discovered that the process sheets were incorrect in that the operations described therein could not be performed by the tools indicated on the nine prints. Plaintiff took the nine prints and the process sheets back to the Studebaker Company and explained the errors in the process sheets. It was the obligation of the Studebaker Company to have its engineers prepare correct process sheets if it wanted the tools manufactured by the Trust Company. The Studebaker Company was short of engineers and its vice-president asked plaintiff if the Trust Company would do the engineering work necessary to correct the process sheets and he said that he thought it would. When plaintiff returned to the Trust Company and advised its president of the Studebaker Company's predicament and the request of its vice-president that the Trust Company correct the process sheets, the president of the Trust Company said that it had no engineers available to do this work and asked plaintiff if he would do it. Plaintiff agreed to do it and he worked every evening, Saturday afternoons and Sundays for six weeks in the performance of this engineering work. When plaintiff completed his work in correcting the process sheets the Studebaker Company sent the Trust Company a check for \$25,000 in payment for said work. The Trust Company turned the \$25,000 over to plaintiff without deducting anything

therefrom. The tools comprised in the Studebaker Company's \$300,000 order were designed and manufactured by the Brust Company in accordance with the blue prints furnished by the Studebaker Company and the corrected process sheets prepared by plaintiff. The Studebaker Company received the tools and paid \$300,000 for them and the defendant received its full commission of 10% on this order.

Plaintiff's theory as stated in his brief is that "he is entitled to recover from the defendant for commissions earned on orders obtained by him as salesman for the defendant, the sum of \$12,759.34; that the amount of said commissions is evidenced by statements rendered from time to time by the defendant to the plaintiff, all of which statements were introduced in evidence and that the above amount is the balance due after allowing to the defendant certain credits as shown in plaintiff's amended complaint as amended"; and that "he was not obliged to devote all his time and attention to the business of the defendant; that his agreement with the defendant did not require him to devote any particular amount of time to the defendant's business; that the engineering services that he performed for the Brust Tool Co., for which he received additional compensation, were entirely outside the scope and hours of his employment by the defendant; that such extra services were not required of him in order to secure orders; that such services should have been performed by the engineering department of the Studebaker Co.; that the latter company had not sufficient engineers to perform that work; hence they looked to Brust Tool Company to furnish that service; that the plaintiff performed that work during nights and on Saturday afternoons and Sundays; that such extra services did not interfere with the work performed by him for the defendant or the business of the defendant, but on the contrary was most beneficial to the defendant

The tools contained in the First Baker Company's \$300,000 order were assigned and manufactured by the First Baker Company in accordance with the plans furnished by the First Baker Company, and the corrected process sheets prepared by plaintiff. The First Baker Company received the tools and paid \$300,000 for them and the defendant received its full commission of 10% on this order.

Plaintiff's theory as stated in his brief is that "he is entitled to recover from the defendant for commissions earned on orders obtained by him as salesman for the defendant, the sum of \$12,750.00; that the amount of said commissions is evidenced by statements rendered from time to time by the defendant to the plaintiff, all of which statements were introduced in evidence and that the above amount is the balance due after allowing to the defendant certain credits as shown in plaintiff's amended complaint as amended; and that he was not obliged to devote all his time and attention to the business of the defendant; that his agreement with the defendant did not require him to devote any particular amount of time to the defendant's business; that the engineering services that he performed for the First Tool Co., for which he received additional compensation, were entirely outside the scope and hours of his employment by the defendant; that such extra services were not required of him in order to secure orders; that such services should have been performed by the engineering department of the First Baker Co.; that the latter company had not sufficient engineers to perform that work; hence they looked to First Tool Company to furnish that service; that the plaintiff performed that work during nights and on Saturday afternoons and Sundays; that such extra services did not interfere with the work performed by him for the defendant on the business of the defendant, but on the contrary was most beneficial to the defendant

because the plaintiff was as a result of such work able to obtain orders that Brust Tool Company subsequently manufactured and on which defendant was paid a commission."

Defendant's theory is that plaintiff as its agent "violated the obligations imposed by law upon him in that he failed to show good faith and loyalty toward defendant when, in the course of his employment, he obtained secret profits therefrom above his usual remuneration and failed to disclose said secret profits and account for same to the defendant"; that "the secret profits in the sum of at least \$28,000 received by plaintiff from the Brust Tool Manufacturing Company for services performed for Studebaker Corporation arose in the course of and by reason of his employment by defendant and that said \$28,000 lawfully belongs to defendant as his employer, and inasmuch as that amount is more than twice the amount plaintiff claims from defendant, that plaintiff has failed to prove that there is any sum due him from defendant"; and that "plaintiff by receiving such secret profits rightfully due to defendant and failing to disclose and account for the same has perpetrated a fraud upon his principal and cannot recover any commissions allegedly due by virtue of the contractual relationship in the course of which the fraudulent acts occurred."

In passing upon a motion for a finding and judgment in defendant's favor at the close of plaintiff's evidence in a case tried by the court without a jury, a trial judge is bound by the same rules which should govern a trial court in passing upon a motion to direct a verdict made at the conclusion of plaintiff's evidence. These rules are clearly stated in Hunter v. Troup, 315 Ill. 293, where the court said at pp. 296, 297:

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable

because the plaintiff was a result of such work able to obtain orders that Great Tool Company subsequently submitted and on which defendant was paid a commission."

Defendant's theory is that plaintiff as its agent violated the obligations imposed by law upon him in that he failed to show good faith and loyalty toward defendant when, in the course of his employment, he obtained secret profits therefrom above his usual remuneration and failed to disclose said secret profits and account for same to the defendant; that "the secret profits in the sum of at least \$28,000 received by plaintiff from the Great Tool Manufacturing Company for services performed for Studebaker Corporation arose in the course of and by reason of his employment by defendant and that said \$28,000 lawfully belongs to defendant as his employer, and inasmuch as that amount is more than twice the amount plaintiff claims from defendant, that plaintiff has failed to prove that there is any sum due him from defendant; and that "plaintiff by receiving such secret profits rightfully due to defendant and failing to disclose and account for the same has perpetrated a fraud upon his principal and cannot recover any commissions allegedly due by virtue of the contractual relationship in the course of which the fraudulent acts occurred."

In passing upon a motion for a finding and judgment in defendant's favor at the close of plaintiff's evidence in a case tried by the court without a jury, a trial judge is bound by the same rules which should govern a trial court in passing upon a motion to direct a verdict made at the conclusion of plaintiff's evidence. These rules are clearly stated in Hunter v. Tracy, 315 Ill. 593, where the court said at pp. 596, 597:

"A motion to instruct the jury to find for the defendant is in the nature of a motion to the evidence, and the rule is that the evidence so admitted to, in its aspect most favorable

to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489."

Therefore, if plaintiff's evidence made out a prima facie case it must be held that the judgment from which this appeal was taken was erroneously entered.

Defendant cites numerous authorities in support of its contention that the \$28,000 which plaintiff received for engineering services performed by him for the Studebaker Company in preparing the corrected process sheets constituted secret profits earned by him in the course of his employment and that said \$28,000 belonged to it. While such authorities enunciate correct principles of law, in our opinion they are not applicable to the facts as shown by the evidence adduced by plaintiff and therefore it would serve no useful purpose to discuss them.

It clearly appears from plaintiff's evidence that he did not breach his contract with the defendant, that he made no secret earnings or profits in the course of and as a result of his employment by defendant, that he did not violate any duty he owed to defendant, that he exercised good faith and loyalty to defendant as to every transaction he handled within the course of his employment and that defendant received from the Brust Company its full commission on every order obtained by plaintiff as the result of which tools were manufactured by said company.

The general rule is that the employer is not entitled to earnings or profits of the employee outside of business hours, as at night or Sundays or holidays, in a business or in the performance of services not inconsistent or interfering with the business of the employer and not lessening the value of the

to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contrary evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In review in the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to applicant. Yes v. Yes, 255 Ill. 414; Logan v. Lewis, 229 Ill. 100; Lick v. Lick, 215 Ill. 408."

On all was taken was erroneously entered.

Defendant cites numerous authorities in support of its contention that the \$25,000 which Plaintiff received for engineering services rendered by him for the defendant Company in promoting the corrected process should constitute secret profits earned by him in the course of his employment and that said \$25,000 belonged to it. While such authorities enunciate correct principles of law, in our opinion they are not applicable to the facts as shown by the evidence. Indeed by Plaintiff and therefore it would serve no useful purpose to discuss the same.

It is clearly apparent from plaintiff's evidence that he did not breach his contract with the defendant, that he made no secret earnings or profits in the course of and as a result of his employment by defendant, that he did not violate any duty he owed to defendant, that he exercised good faith and loyalty to defendant as to every transaction he handled within the course of his employment and that defendant received from the First Company the full commission on every order obtained by plaintiff as the result of which tools were manufactured by said company. The court rules that the employer is not entitled to earnings or profits of the employee outside of business hours, as at night or Sundays or holidays, in a business or in the performance of services not inconsistent or interfering with the business of the employer and not lessening the value of the

employee's services to him. (35 Am. Jur. 517, sec. 88;
Wallace et al. v. DeYoung, 98 Ill. 638.)

While plaintiff admitted that it was one of his duties as sales agent for defendant to advise his customer manufacturers, when necessary, as to the type of tools required to perform operations outlined by them, there was no necessity for any such advice in connection with the order in question. The Studebaker Company knew what operations it wanted performed and the tools required to perform them. Its own engineers prepared the blue prints for the tools and the original process sheets showing the operations to be performed by such tools. The process sheets prepared by its engineering department were incorrect. Because of the tremendous impact of war production, it had no engineers available to make corrected process sheets. Plaintiff prepared the corrected process sheets during the time heretofore indicated and, as already stated, he was paid \$28,000 for this work.

It is idle to urge that plaintiff performed this work or that he was paid therefor "in the course of and out of his agency," "in the course of and as a result of his employment" or "through his employment." There is no evidence in the record that supports defendant's position that the work for which plaintiff was paid the \$28,000 came within any of his prescribed duties as defendant's agent or that it was performed within the course of his employment. Such work was distinct and separate and apart from any duty plaintiff owed defendant as its agent. Certainly the Studebaker Company would not have paid \$28,000 for this work if Terrell was obligated to do it as defendant's agent. The absurdity of defendant's position is demonstrated by the fact that it would have to admit that it, as plaintiff's employer, was obligated to prepare the corrected process sheets before it could claim that Terrell

employee's services to him. (25 Am. Jur. 217, sec. 22)

Wallace et al. v. Tervell, 28 Ill. (1888.)

While plaintiff admitted that it was one of his duties

as sales agent for defendant to advise his customer merchants

thereof, when necessary, as to the type of tools required to

perform operations outlined by them, there was no necessity

for any such advice in connection with the order in question.

The Studebaker Company knew that operations it wanted per-

formed and the tools required to perform them. Its own

engineers prepared the blue prints for the tools and the

original process sheets showing the operations to be performed

by such tools. The process sheets prepared by its engineering

department were incorrect. Because of the tremendous impact

of war production, it had no engineers available to make

corrected process sheets. Plaintiff prepared the corrected

process sheets during the time heretofore indicated and, as

already stated, he was paid \$28,000 for this work.

It is idle to urge that plaintiff performed this work

on that he was paid therefor "in the course of and out of his

agency," "in the course of and as a result of his employment"

or "through his employment." There is no evidence in the

record that supports defendant's position that the work for

which plaintiff was paid the \$28,000 came within any of his

prescribed duties as defendant's agent or that it was performed

within the course of his employment. Such work was distinct

and separate and apart from any duty plaintiff owed defendant

as its agent. Certainly the Studebaker Company would not have

paid \$28,000 for this work if Tervell was obligated to do it

as defendant's agent. The absurdity of defendant's position

is demonstrated by the fact that it would have to admit that

it, as plaintiff's employer, was obligated to prepare the

corrected process sheets before it could claim that Tervell

was acting within the course of his employment in preparing same.

As shown by plaintiff's evidence, this is not a case where he wrongfully withheld undisclosed profits obtained by him in the course of and as a result of his employment. It is a case rather where plaintiff legitimately earned \$28,000 as a fee for performing services entirely outside the hours and the course of his employment and which he was under no duty to perform as defendant's agent. There was nothing about plaintiff's performance of the aforesaid services that lessened the value of his services to defendant or interfered with the latter's business and Terrell owed no legal duty to defendant to apprise it of the work performed by him in preparing the corrected process sheets for the Studebaker Company or of the compensation he received therefor.

Not only did plaintiff's evidence make out a prima facie case but it clearly showed that defendant owed him a balance of \$12,759.34 in earned commissions and that he did not breach his contract of employment with defendant. Therefore, it must be held that the trial court erred in entering judgment in favor of defendant at the conclusion of plaintiff's evidence.

For the reasons stated herein the judgment of the Superior court of Cook county is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED FOR NEW TRIAL.

Friend, P. J., and Scanlan, J., concur.

was acting within the course of his employment in preparing

same.

As shown by Plaintiff's evidence, this is not a case

where he wrongfully obtained undisclosed profits obtained by

him in the course of and as a result of his employment. It

is a case rather where Plaintiff legitimately earned \$23,000

as a fee for performing services entirely outside the hours

and the course of his employment and which he was under no

duty to perform as Defendant's agent. There was nothing

about Plaintiff's performance of the aforesaid services that

lessened the value of his services to Defendant or interfered

with the latter's business and Torrell owed no legal duty to

Defendant to appraise it of the work performed by him in pre-

paring the corrected process sheets for the Studobaker Company

or of the compensation he received therefor.

Not only did Plaintiff's evidence raise out a prima

facie case but it clearly showed that Defendant owed him a

balance of \$12,734.34 in earned commissions and that he did

not breach his contract of employment with Defendant. There-

fore, it was held that the trial court erred in entering

judgment in favor of Defendant at the conclusion of plain-

tiff's evidence.

For the reasons stated herein the judgment of the

superior court of Cook County is reversed and the cause

remanded for a new trial.

VERDICT AND
JURY REVEREND FOR NEW TRIAL.

Verdict, \$12,734.34, and so award, \$12,734.34, costs.

43706

329 I.A. 184

BEATRICE BURGERMAN KAPLAN,
Appellee,

v.

JACOB L. KAPLAN,

Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

373

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

July 13, 1943, Mrs. Kaplan was granted a decree of divorce from her husband, Jacob, on the ground of repeated cruelty. The parties entered into an agreement as to their property rights, which was approved by the court as fair and proper. The care and custody of the minor children, Donna, 5, and Andrea, 2 1/2 years of age, was awarded to Mrs. Kaplan. The decree ordered that the defendant should pay to plaintiff as and for her alimony, rent and support of the children the sum of \$250.00 per month "beginning with the entry of this decree and payable each month thereafter until further order of this court".

February 10, 1944, the decree was modified by directing as to the children that they be put in the Bateman School in Chicago; that defendant pay directly to the school \$150.00 per month for their support and tuition. This order also directed defendant to pay to Mrs. Kaplan \$100.00 per month for alimony.

August 20, 1945, plaintiff filed a petition setting forth that defendant had failed and refused to pay the alimony of \$100.00 per month, as provided in the order of February 10, 1944, except the sum of \$714.00; that there had accrued alimony amounting to \$1086.00 up to and including August 10, 1945. Defendant answered August 24th. He did not deny that he

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY,

BEATRICE BURBANK KAPLAN,
Appellee,
v.
JACOB L. KAPLAN,
Appellant.

MR. PRESIDING JUSTICE DELIVERED THE OPINION OF THE COURT.

July 13, 1943, Mrs. Kaplan was granted a decree of divorce from her husband, Jacob, on the ground of repeated cruelty. The parties entered into an agreement as to their property rights, which was approved by the court as fair and proper. The care and custody of the minor children, Bonnie, 6, and Andrew, 2 1/2 years of age, was awarded to Mrs. Kaplan. The decree ordered that the defendant should pay to plaintiff as and for her alimony, rent and support of the children the sum of \$250.00 per month "beginning with the entry of this decree and payable each month thereafter until further order of this court".

February 10, 1944, the decree was modified by directing as to the children that they be put in the Bateman School in Chicago; that defendant pay directly to the school \$150.00 per month for their support and tuition. This order also directed defendant to pay to Mrs. Kaplan \$100.00 per month for alimony.

August 20, 1945, plaintiff filed a petition setting forth that defendant had failed and refused to pay the alimony of \$100.00 per month, as provided in the order of February 10, 1944, except the sum of \$714.00; that there had accrued alimony amounting to \$1085.00 up to and including August 10, 1945. Defendant answered August 24th. He did not deny that he

2.

owed the alimony to the amount alleged, but said he was "financially unable to pay the plaintiff the sum of \$1086.00 or any other sum", and that his failure to pay was not willful.

November 15, 1945, plaintiff filed another petition in which she again averred that \$1086.00 unpaid alimony was due from defendant to her up to and including August 10, 1945, and prayed judgment for that amount. Defendant answered November 21st. He again failed to deny that there was due to plaintiff the sum of \$1086.00 for unpaid alimony, as alleged.

December 7, 1945, the petitions of August 20th and November 15th with defendant's answers came on for hearing before the court. Defendant by leave filed instanter an amended answer. For the first time he denied (only generally) he owed plaintiff \$1086.00 for unpaid alimony. He attached to his amended answer Exhibits "A", "B" and "C". Exhibit "A" purported to show "Moneys paid to Beatrice Kaplan Since Decree"; Exhibit "B", "Moneys Expended for Medical Care, Nursing and Health of Two Minor Children"; Exhibit "C", "Money Paid for School Expenses for Children and Camping". Exhibit "A" is important, since it shows the account between defendant and plaintiff. It shows that on February 26, 1944, defendant paid to plaintiff \$100.00. It shows: "Since: July, 1945 to date..... (None)". It also shows that from March, 1944, to July, 1945, only \$42.00 each month was paid by defendant to plaintiff, and that these payments were made out of allotments received from the U. S. Government while defendant was in the military service, a total sum of \$714.00. It thus shows that for a period of 17 months plaintiff received only \$42.00 per month, and that defendant was short in his payments under the order of February 10, 1944, \$58.00 per month, a total sum of \$986.00. It shows no payment for the month of July, 1945. A simple computation, therefore, shows a total amount due for past

owed the alimony to the amount alleged, but said he was "financially unable to pay the plaintiff the sum of \$1086.00 or any other sum", and that his failure to pay was not willful.

November 15, 1945, plaintiff filed another petition in which she again averred that \$1086.00 unpaid alimony was due from defendant to her up to and including August 10, 1945, and prayed judgment for that amount. Defendant answered November 15th. He again failed to deny that there was due to plaintiff the sum of \$1086.00 for unpaid alimony, as alleged.

December 7, 1945, the petition of August 20th and November 15th with defendant's answers came on for hearing before the court. Defendant by leave filed instantor an amended answer. For the first time he denied (only generally) he owed plaintiff \$1086.00 for unpaid alimony. He attached to his amended answer Exhibits "1", "2" and "3". Exhibit "A" purported to show "Money paid to Justice Kaplan since Decree"; Exhibit "2", "Money Expended for Medical Care, Nursing and Health of Two Minor Children"; Exhibit "3", "Money Paid for School Expenses for Children and Clothing". Exhibit "A" is important, since it shows the account between defendant and plaintiff. It shows that on February 10, 1944, defendant paid to plaintiff \$100.00. It shows: "Since: July, 1945 to date:..... (None)". It also shows that from March, 1944, to July, 1945, only \$40.00 each month was paid by defendant to plaintiff, and that those payments were made out of allotments received from the U. S. Government while defendant was in the military service, a total sum of \$714.00. It thus shows that for a period of 17 months plaintiff received only \$40.00 per month, and that defendant was short in his payments under the order of February 10, 1944, \$5.00 per month, a total sum of \$86.00. It shows no payment for the month of July, 1945. A simple computation, therefore, shows a total amount due for past

3.

alimony of \$986.00 and \$100.00 or \$1086.00, and this according to defendant's own verified statement of account.

All this developed on the hearing, which has been presented to us by additional abstract of record, showing that these items were fully discussed in the presence of the court by attorneys for the parties. Defendant did not offer any evidence. He was in court on a rule to show cause. He now complains he did not have opportunity to produce evidence and cites Burket v. Reliance Bank & Trust Co., 367 Ill. 196; Hultberg v. Anderson, 252 Ill. 607, and other cases rightly holding due process of law includes not alone notice of the proceeding but also the opportunity to be heard and present evidence on issues of fact. The record shows he was present in court with his third attorney, but no request was made for the opportunity to produce evidence. The law does not require evidence as to issues of fact when pleadings show there is no issue of fact to be tried. Smith Hurd Ill. Anno. Stat., Chap. 110, §40 (2), par. 164, p. 252; Peters v. Peters, 376 Ill. 237; Standard, Inc. v. Kirby, 319 Ill. App. 206, 209.

We do not entertain a doubt on this record defendant owed the amount for which the judgment against him was rendered. It will therefore be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

alimony of \$386.00 and \$106.00 or \$1086.00, and this according to defendant's own written statement of account.

All this developed on the hearing, which has been presented to me by additional abstract of record, showing that these items were fully discussed in the presence of the court by attorneys for the parties. Defendant did not offer any evidence. He was in court on a trial to show cause. He now complains he did not have opportunity to produce evidence and cites Burket v. Williams Bank & Trust Co., 387 Ill. 186; Hulbert v. Anderson, 358 Ill. 807, and other cases rightly holding due process of law includes not alone notice of the proceeding but also the opportunity to be heard and present evidence on issues of fact. The record shows he was present in court with his third attorney, but no request was made for the opportunity to produce evidence. The law does not require evidence as to issues of fact when pleadings show there is no issue of fact to be tried. Smith Ward Ill. Ann. Stat., Chap. 110, §40 (2), par. 184, p. 282; Peters v. Peters, 375 Ill. 237; Standard, Inc. v. Lippy, 316 Ill. 401, 106, 202.

We do not entertain a doubt on this record defendant owes the amount for which the judgment against him was rendered. It will therefore be affirmed.

ATTESTED.

O'Connor and Niemeyer, JJ., concur.

43715

329 I.A. 185'

RUTH SCHIKORA WAYNE,
Appellee,

v.

FREEPORT MOTOR CASUALTY COMPANY,
a corporation of Illinois,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

374

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On a former appeal this court reversed a judgment for plaintiff and remanded the cause for another trial. The principal reason for reversal was the exclusion of evidence offered by the defendant, which in the opinion of the court should have been admitted. Schikora v. Freeport Motor Casualty Co., 320 Ill. App. 359. On the second trial the evidence excluded on the first was admitted. The jury returned a like verdict, and again the court overruled defendant's motion for a new trial and entered judgment on the verdict. Defendant again appeals. On this second appeal it is contended that the verdict was manifestly against the weight of the evidence.

The action is based on an occurrence which took place on February 27, 1937, when plaintiff (then a minor) was riding in the Plymouth automobile of Joseph Grabowski, the automobile driven for him by his brother, John Grabowski. Plaintiff was injured, as she alleged, by the negligence of the driver. Joseph Grabowski held an indemnity policy issued to him on his automobile by defendant July 10, 1936. The policy contains a clause insuring Joseph Grabowski "Against actual loss, from the liability imposed by law upon the Assured on account of bodily injuries and for death accidentally suffered, or alleged to have been suffered, by a person or persons (including damages for necessarily resultant loss of services and for consequential

3221A.185

43715

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

ROTH FORTUNA TAXE,
Appellee,
v.
FREEMONT MOTOR GARAGE COMPANY,
a corporation of Illinois,
Appellant.

MR. PRINCE'S SHORTER OPINION DELIVERED THE OPINION OF THE COURT.

On a former appeal this court reversed a judgment for plaintiff and remanded the cause for another trial. The principal reason for reversal was the exclusion of evidence offered by the defendant, which in the opinion of the court should have been admitted. Schiffers v. Freemont Motor Garage Co., 320 Ill. App. 350. On the second trial the evidence excluded on the first was admitted. The jury returned a like verdict, and again the court overruled defendant's motion for a new trial and entered judgment on the verdict. Defendant again appeals. On this second appeal it is contended that the verdict was manifestly against the weight of the evidence.

The action is based on an occurrence which took place on February 27, 1937, when plaintiff (then a minor) was riding in the Plymouth automobile of Joseph Grabowski, the automobile driven for him by his brother, John Grabowski. Plaintiff was injured, as she alleged, by the negligence of the driver. Joseph Grabowski held an indemnity policy issued to him on his automobile by defendant July 10, 1936. The policy contains a clause insuring Joseph Grabowski "Against actual loss, from the liability imposed by law upon the assured on account of bodily injuries and for death accidentally suffered, or alleged to have been suffered, by a person or persons (including damages for necessarily resultant loss of services and for consequential

2.

damages, for which the Assured is liable) by reason of the ownership, maintenance, or use of any motor vehicle described herein while this policy is in force". Paragraph 11 of the policy provided: "The Assured shall not voluntarily assume any liability, nor incur any expense, nor settle any claim, except at the Assured's own expense. The Assured shall not interfere in any negotiations for settlement nor in any legal proceedings brought against the Assured. However, if any suit is brought to enforce a claim against the Assured, the Assured shall forward immediately thereafter, by registered mail, to the Freeport Motor Casualty Company at their home office, Freeport, Illinois, every summons and other process, as soon as the same is served upon the Assured, and shall aid in securing information and evidence and the attendance of witnesses, and shall cooperate with the Freeport Motor Casualty Company (except in a pecuniary way) in all matters which the Freeport Motor Casualty Company may deem necessary in the course of any suit or in the prosecution of any appeal therefrom".

August 20, 1938, Miss Schikora (now Mrs. Wayne) brought an action in the Superior court against Joseph Grabowski to recover damages for the alleged injuries sustained by her on February 27, 1937. The summons was served by the sheriff, as his return shows, August 30, 1938, "by leaving a copy of the same at defendant's place of abode, with Emily Grabowski (sister), a person of his family of the age of ten years or upwards, and informing such person of the contents thereof". The return also shows that on August 31, 1938, "a copy of the within writ was placed in a sealed envelope, with postage fully prepaid, addressed to the said defendant at such usual place of abode", was sent by mail to the defendant. The return is signed "John Toman, Sheriff by George Bates, Deputy".

September 29, 1939, defendant was defaulted, and Mrs.

damages, for which the Assured is liable) by reason of the ownership, maintenance, or use of any motor vehicle described herein while this policy is in force". Paragraph 11 of the policy provided: "The Assured shall not voluntarily assume any liability, nor incur any expense, nor settle any claim, except at the Assured's own expense. The Assured shall not interfere in any negotiations for settlement nor in any legal proceedings brought against the Assured. However, if any suit is brought to enforce a claim against the Assured, the Assured shall forward immediately thereafter, by registered mail, to the Freeport Motor Casualty Company at their home office, Freeport, Illinois, every summons and other process, as soon as the same is served upon the Assured, and shall aid in securing information and evidence and the attendance of witnesses, and shall cooperate with the Freeport Motor Casualty Company (except in a pecuniary way) in all matters which the Freeport Motor Casualty Company may deem necessary in the course of any suit or in the prosecution of any appeal therefrom".

August 30, 1938, Miss Delmore (now Mrs. Wayne) brought an action in the Superior Court against Joseph Grabowski to recover damages for the alleged injuries sustained by her on February 27, 1937. The summons was served by the sheriff, as his return shows, August 30, 1938, "by leaving a copy of the same at defendant's place of abode, with Emily Grabowski (sister), a person of his family of the age of ten years or upwards, and informing such person of the contents thereof". The return also shows that on August 31, 1938, "a copy of the within writ was placed in a sealed envelope, with postage fully prepaid, addressed to the said defendant at such usual place of abode", was sent by mail to the defendant. The return is signed "John Toman, Sheriff by George Bates, Deputy".

September 16, 1938, defendant was defaulted, and Mrs.

3.

Wayne recovered judgment against him for \$3,000.00 and costs. November 1, 1939, she caused an execution to issue on the judgment. The sheriff served the same on Joseph Grabowski November 7, 1939, together with a bill of costs. January 11, 1940, the execution was returned by the sheriff, "No Property Found". The copy of the execution and bill of costs were mailed by Joseph Grabowski to defendant insurance company by registered mail and was by it returned to Joseph Grabowski April 8, 1940.

April 8, 1940, plaintiff brought this action at law against the casualty company to recover \$3,000.00 the amount of her judgment against Grabowski in the Circuit Court of Cook County. The suit was based on the Act of May 11, 1933, (Ill. State. Bar Stat., 1935, Chap. 73, par. 466, §1). It reads:

"All policies hereinafter issued by an insurance carrier organized or doing business under the laws of this State insuring or indemnifying any person against loss or liability for the death or for any injury to the person or to the property of another shall be deemed and construed to contain a provision that the carrier shall be liable to the person entitled to recover for such death or for any such injury to the person or property when caused by the insured in the same manner and to the same extent that such carrier is liable to the insured. Such liability may be enforced by the person entitled to recover by an action against the carrier which may be commenced at any time after the rendition of final judgment in favor of such person against the insured."

Apparently in conformity with this statute the insurance policy provided:

"The Company shall be liable to any person entitled to recover for death or for any injury to the person or property when caused by the insured in the same manner and to the same extent that such Company is liable to the insured. Such liability may be enforced by the person entitled to recover by an action against the Company which may be commenced at any time after the rendition of final judgment in favor of such person against the insured."

The defendant company admitted that it had notice of

Wayne recovered judgment against him for \$3,000.00 and costs. November 1, 1939, she caused an execution to issue on the judgment. The sheriff served the same on Joseph Grabowski. November 7, 1939, together with a bill of costs, January 11, 1940, the execution was returned by the sheriff, "No Property Found". The copy of the execution and bill of costs were mailed by Joseph Grabowski to defendant insurance company by registered mail and was by it returned to Joseph Grabowski April 3, 1940.

April 5, 1940, plaintiff brought this action at law against the casualty company to recover \$3,000.00 the amount of her judgment against Grabowski in the Circuit Court of Cook County. The suit was based on the 1st of May 11, 1939 (Ill. State. Rev. Stat., 1935, Chap. 73, para. 466, 467). It reads:

"All policies hereinafter issued by an insurance carrier organized or doing business under the laws of this State insuring or indemnifying any person against loss or liability for the death or for any injury to the person or to the property of another shall be deemed and construed to contain a provision that the carrier shall be liable to the person entitled to recover for such death or for any such injury to the person or property when caused by the insured in the same manner and to the same extent that such carrier is liable to the insured. Such liability may be enforced by the person entitled to recover by an action against the carrier which may be commenced at any time after the rendition of final judgment in favor of such person against the insured."

Apparently in conformity with this statute the insurance

policy provided:

"The Company shall be liable to any person entitled to recover for death or for any injury to the person or property when caused by the insured in the same manner and to the same extent that such Company is liable to the insured. Such liability may be enforced by the person entitled to recover by an action against the Company which may be commenced at any time after the rendition of final judgment in favor of such person against the insured."

The defendant company admitted that it had notice of

4.

the claim of plaintiff against Joseph Grabowski prior to the beginning of the action in the Superior Court but denies that any copy of the summons in the suit brought by plaintiff against Joseph Grabowski was ever sent to it by registered mail or in any other manner; and says that it had no notice at any time of the filing of the action, and that by this failure of Joseph Grabowski to comply with the terms and conditions of the policy defendant is not liable to the plaintiff. This is the defense interposed in this case.

The complaint alleged on information and belief that after the receipt of the summons Joseph Grabowski caused it to be delivered to the defendant. The answer of the defendant denied this to be true, and this was practically the only issue of fact in the case.

In this trial, as on the former, plaintiff produced Pat Tomaso as a witness. He testified in substance that he had known Joseph Grabowski for ten years; that he had worked for him, starting in 1936 and quitting the latter part of 1930; that he was working for him on or about September 1, 1938. His testimony in substance is that about September 1 or 2, 1938, he delivered a summons for Mr. Joseph Grabowski to the office of the insurance Company. He describes the summons as a yellow piece of paper about 8 by 13 inches long and says he remembers it had on it the names of Grabowski and Schikora; that he gave the summons to a girl in the office of the insurance company at 212 Marion Street, Oak Park, and that she in turn, in his presence, handed it to a Mr. Carr, who was also in the office of the Insurance company. He says he told the girl it was Mr. Grabowski's and that Grabowski wanted him to hand it to Mr. Carr. He says she handed it to Mr. Carr; that Carr looked at it and said, "All right, we will take care of it," and he (the witness) walked out.

The girl at the desk, to whom Tomaso says he gave the

the claim of plaintiff against Joseph Grabowski prior to the beginning of the action in the Superior Court but denies that any copy of the summons in the suit brought by plaintiff against Joseph Grabowski was ever sent to it by registered mail or in any other manner; and says that it had no notice at any time of the filing of the action, and that by this failure of Joseph Grabowski to comply with the terms and conditions of the policy defendant is not liable to the plaintiff. This is the defense interposed in this case.

The complaint alleged on information and belief that after the receipt of the summons Joseph Grabowski caused it to be delivered to the defendant. The answer of the defendant denied this to be true, and this was practically the only issue of fact in the case.

In this trial, as on the former, plaintiff produced Pat Tomaso as a witness. He testified in substance that he had known Joseph Grabowski for ten years; that he had worked for him, starting in 1906 and quitting the latter part of 1930; that he was working for him on or about September 1, 1932. His testimony in substance is that about September 1 or 2, 1932, he delivered a summons for Mr. Joseph Grabowski to the office of the Insurance Company. He described the summons as a yellow piece of paper about 8 by 12 inches long and says he remembers it had on it the names of Grabowski and Behlkor; that he gave the summons to a girl in the office of the insurance company at 212 Marion Street, Oak Park, and that she in turn, in his presence, handed it to a Mr. Carr, who was also in the office of the insurance company. He says he told the girl it was Mr. Grabowski's and that Grabowski wanted him to hand it to Mr. Carr. He says she handed it to Mr. Carr; that Carr looked at it and said, "All right, we will take care of it," and he (the witness) walked out. The girl at the desk, to whom Tomaso says he gave the

5.

summons, was Ethel Mott (now Mrs. Johnson). The claim agent, to whom Tomaso says she handed the summons in his presence, was William G. Carr, whose deposition was taken for the reason that he was about to enter the service of the U. S. Army. Mrs. Johnson says when a summons was brought in and delivered to her, she would draw a file, clip the summons to the outside of the file and then deliver it to Mr. Carr. A summons, she says, was given particular attention in that office; it was the most important thing that came there. She is positive that during the month of September, 1938, no one delivered a summons to her in which Ruth Schikora was plaintiff and Joseph Grabowski defendant. Tomaso, she says, had been pointed out to her on the former trial, but she had never seen him before. Mr. Carr's desk was located behind her desk, and when she sat at her desk she was about 10 or 15 feet distant from him. She says there was a file on the Grabowski matter; that they knew about the accident but did not have a litigated file on it.

The deposition of Mr. Carr says he was claims attorney for the defendant at the Oak Park office. He knew Joseph Grabowski but did not see him at the office in November, 1938, and that he first learned of the action filed by Ruth Schikora on December 1, 1939, when Mr. Grabowski forwarded to him some legal documents through the mail. These were the execution and a copy of the bill of costs, which he returned to Mr. Grabowski by registered mail.

Burt A. Crowe was attorney for defendant and offered as a witness at the first trial. He withdrew as attorney in the case and testified on the second trial. He says he first met Joseph W. Grabowski on September 6, 1939; that William Carr called the matter to his attention by phone and afterwards Mr. Grabowski came to his office, said he owned an automobile^{covered} by an indemnity policy of the defendant company and told of the occurrence in which Miss Schikora was injured; that from that

occurrence in which Miss Schikors was injured; that from that an indemnity policy of the defendant company and told of the Grabowski came to his office, said he owned an automobile covered called the matter to his attention by phone and afterwards Mr. Joseph W. Grabowski on September 6, 1933; that William Carr case and testified on the second trial. He says he first met a witness at the first trial. He withdrew as attorney in the But A. Grove was attorney for defendant and offered as by registered mail.

a copy of the bill of costs, which he returned to Mr. Grabowski legal documents through the mail. These were the execution and on December 1, 1933, when Mr. Grabowski forwarded to him some and that he first learned of the action filed by Ruth Schikors Grabowski but did not see him at the office in November, 1933, for the defendant at the Oak Park office. He knew Joseph The deposition of Mr. Carr says he was claims attorney accident but did not have a litigated file on it.

was a file on the Grabowski matter; that they knew about the she was about 10 or 15 feet distant from him. She says there desk was located behind her desk, and when she sat at her desk former trial, but she had never seen him before. Mr. Carr's defendant. Tomaso, she says, had been pointed out to her on the in which Ruth Schikors was plaintiff and Joseph Grabowski the month of September, 1933, no one delivered a summons to her important thing that came there. She is positive that during was given particular attention in that office; it was the most of the file and then deliver it to Mr. Carr. A summons, she says, to her, she would draw a file, clip the summons to the outside Mrs. Johnson says when a summons was brought in and delivered that he was about to enter the service of the U. S. Army. was William G. Carr, whose deposition was taken for the reason to whom Tomaso says she handed the summons in his presence, summons, was Ethel Mott (now Mrs. Johnson). The claim agent,

6.

time until the latter part of November he heard nothing more of the matter until the execution and bill of costs were sent to him. Mr. Grabowski said to Crowe that he had never been served with any legal papers by anybody in connection with any law suit. In response to a question from Crowe, Grabowski said it was "utterly impossible for him to turn any summons over to the company because he had never received any summons, that he had never known about a law suit being filed against him". Mr. Crowe says he then called his secretary into the office; that Grabowski reiterated these facts as above stated. Crowe dictated them to his secretary, who took the statement down in shorthand, then went into another room, reduced the statement to writing and brought it back to the office while Grabowski was there. Crowe took the paper she had written, read it to Grabowski aloud and asked him if it was true. He asked him if he would sign it, and he said he would. Joseph Grabowski then signed his name to the statement the stenographer had written, which is in evidence as defendant's exhibit No. 2. In this statement (too lengthy to quote in full) Joseph Grabowski says:

"I never knew that any suit was brought against me. I never received any summons from any court or lawyer and, of course, not having received any summons, I never turned any summons or other court paper over to the Freeport Motor Casualty Company. If a suit was brought against me and judgment taken, I never had any knowledge of it."

The paper was signed "Joseph W. Grabowski" and witnessed by Burt A. Crowe.

Mr. Crowe's stenographer, Mrs. Lillian Prince DeMasco, testifies corroborating in detail the evidence of Crowe. She says she truly transcribed what Grabowski said and saw him sign the statement.

The issue here, as on the former appeal, is whether Joseph Grabowski caused notice of the action against him to be

time until the latter part of November he heard nothing more of the matter until the execution and bill of costs were sent to him. Mr. Grabowski said to Crowe that he had never been served with any legal papers by anybody in connection with any law suit. In response to a question from Crowe, Grabowski said it was "utterly impossible for him to turn any summons over to the company because he had never received any summons, that he had never known about a law suit being filed against him". Mr. Crowe says he then called his secretary into the office; that Grabowski reiterated these facts as above stated. Crowe dictated them to his secretary, who took the statement down in shorthand, then went into another room, reduced the statement to writing and brought it back to the office while Grabowski was there. Crowe took the paper she had written, read it to Grabowski aloud and asked him if it was true. He asked him if he would sign it, and he said he would. Joseph Grabowski then signed his name to the statement the stenographer had written, which is in evidence as defendant's exhibit No. 2. In this statement (too lengthy to quote in full) Joseph Grabowski says:

"I never knew that any suit was brought against me. I never received any summons from any court or lawyer and, of course, not having received any summons, I never turned any summons or other court paper over to the Freedport Motor Casualty Company. If a suit was brought against me and judgment taken, I never had any knowledge of it."

The paper was signed "Joseph W. Grabowski" and witnessed by Bert A. Crowe.

Mr. Crowe's stenographer, Mrs. Lillian Prince Delano, testifies corroborating in detail the evidence of Crowe. She says she truly transcribed what Grabowski said and saw him sign the statement.

The issue here, as on the former appeal, is whether Joseph Grabowski caused notice of the action against him to be

7.

given to the insurance company. It is quite true the evidence of Tomaso as a whole is indefinite, uncertain and at times contradictory, yet he positively testified that at the time stated, by the direction of Joseph Grabowski he left the summons at the office of defendant with its agent. This is denied by those who he says received it. It was suggested in the former opinion that Joseph Grabowski would have an opportunity to testify on the next trial. He did not do so. It is apparent that neither party wished to vouch for his reliability. We do not doubt the testimony given by Mr. Crowe and his stenographer. We do not question the truthfulness of Mrs. Johnson or Mr. Carr. However, there is a possibility with the amount of work they had to do and the time that had elapsed that their memories may have been faulty. Two juries (twenty-four men and women), who saw and heard the witnesses testify, have returned verdicts for plaintiff. Two judges, who saw and heard the witnesses, have denied motions for a new trial and entered judgment on the verdict for plaintiff. The statement of Joseph Grabowski made to Mr. Crowe, while admissible, is of no weight as against the return of the sheriff. There is no doubt on this record that Joseph Grabowski was served with summons in the suit, and that fact could not be contested in this action on the pleadings. Chapman v. North American Ins. Co., 292 Ill. 179.

There is no invariable rule that we will not reverse a second time for the reason that a verdict is manifestly against the evidence. This court did so as will appear from an examination of Campbell v. C. B. Q. R. R. Co., 305 Ill. 264, 314 Ill. App. 384. It declined to reverse a third time in that case for that reason, 319 Ill. App. 453.

This issue of fact was peculiarly for the jury, and we

This issue of fact was peculiarly for the jury, and we
that case for that reason, 313 Ill. App. 453.
304, 314 Ill. App. 384. It declined to reverse a third time in
an examination of Campbell v. G. B. R. R. Co., 305 Ill.
against the evidence. This court did so as will appear from
a second time for the reason that a verdict is manifestly
There is no inevitable rule that we will not reverse
pleadings. Green v. North American Ins. Co., 332 Ill. 179.
and that fact could not be contested in this action on the
record that Joseph Gradowski was served with summons in the suit,
as against the return of the sheriff. There is no doubt on this
Gradowski made to Mr. Grove, while admissible, is of no weight
judgment on the verdict for plaintiff. The statement of Joseph
witnesses, have denied motions for a new trial and entered
verdicts for plaintiff. Two judges, who saw and heard the
women), who saw and heard the witnesses testify, have returned
memories may have been faulty. Two juries (twenty-four men and
they had to do and the time that had elapsed that their
Garr. However, there is a possibility with the amount of work
We do not question the truthfulness of Mrs. Johnson or Mr.
not doubt the testimony given by Mr. Grove and his stenographer.
that neither party wished to vouch for his reliability. We do
to testify on the next trial. He did not do so. It is apparent
the former opinion that Joseph Gradowski would have an opportunity
denied by those who he says received it. It was suggested in
summons at the office of defendant with its agent. This is
stated, by the direction of Joseph Gradowski he left the
contradictory, yet he positively testified that at the time
of Toronto as a whole is indefinite, uncertain and at times
given to the insurance company. It is quite true the evidence

8.

are not persuaded the cause should be remanded for a third trial. The judgment will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

are not reversed the cause should be remanded for a third trial. The judgment will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

43727

329 I.A. 185²

MINNIE V. PICKARD,
Appellee,
v.
MILLIE B. RICE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

A
375

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal comes to this court by transfer from the Supreme Court. Pickard v. Rice, 391 Ill. 615. The material facts are clearly and briefly stated in the opinion of the Supreme Court, as follows:

"November 9, 1943, the plaintiff, Minnie V. Pickard, obtained judgment by confession in the municipal court of Chicago for \$30.21 against the defendant, Millie B. Rice, \$19.75 representing the unpaid balance of rent of an apartment for the month of November, 1942, and \$10.46, attorney's fees. Thereafter, defendant filed a petition, an amended petition, and a second amended petition, to vacate the judgment. Her third petition averred that she had discharged her obligations under the lease by payment of an agreed amount of \$11.25. January 5, 1944, defendant's petition was overruled. More than a year after the entry of the judgment by confession, and nearly eleven months subsequent to the day defendant's petition to vacate the judgment was overruled, namely, on November 27, 1944, she filed a motion to vacate the judgment and dismiss the cause, described in her brief (but not in the motion itself) as a motion in the nature of a writ of error coram nobis. The grounds supporting the motion, among others, were that the lease was a violation of regulations relative to rent for housing accommodations in the defense-rental area of Chicago issued by the Office of Price Administration, conformably to the Federal Emergency Price Control Act of 1942, and that, in consequence, the lease was void, the warrant of attorney without and force or effect, and the judgment rendered a fraud upon the court. The motion concluded by averring that had the trial court been informed of the foregoing facts, the judgment would not have been entered; that the facts recounted did not appear of record, and that by reason of them the court lacked jurisdiction to render the judgment assailed. December 4, 1944, defendant's motion to vacate the judgment by confession and dismiss the cause was over-

3231A.185

MINNIE V. RICHARD,
Appellee,
v.
MILLIE B. RICE,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUDGE LATHEWIT DELIVERED THE OPINION OF THE COURT.

This appeal comes to this court by transfer from the
Supreme Court. Richard v. Rice, 391 Ill. 615. The material
facts are clearly and briefly stated in the opinion of the
Supreme Court, as follows:

"November 3, 1943, the plaintiff, Minnie V. Richard, obtained judgment by confession in the municipal court of Chicago for \$30.21 against the defendant, Millie B. Rice, \$10.75 representing the unpaid balance of rent of an apartment for the month of November, 1942, and \$10.46, attorney's fees. Thereafter, defendant filed a petition, an amended petition, and a second amended petition, to vacate the judgment. Her third petition averred that she had discharged her obligations under the lease by payment of an agreed amount of \$11.25, January 5, 1944. More than a year after the entry of the judgment by confession, and a very eleven months subsequent to the day defendant's petition to vacate the judgment was overruled, namely, on November 27, 1944, she filed a motion to vacate the judgment and dismiss the cause, described in her brief (but not in the motion itself) as a motion in the nature of a writ of error coram nobis. The grounds supporting the motion, among others, were that the lease was a violation of regulations relative to rent for housing accommodations in the defense-rental area of Chicago issued by the Office of Price Administration, conformably to the Federal Emergency Price Control Act of 1942, and that, in consequence, the lease was void, the warrant of attorney without and force on effect, and the judgment rendered a fraud upon the court. The motion concluded by averring that had the trial court been informed of the foregoing facts, the judgment would not have been entered; that the fact, recounted did not appear of record, and that by reason of them the court lacked jurisdiction to render the judgment as called. December 4, 1944, defendant's motion to vacate the judgment by confession and dismiss the cause was over-

ruled. Seeking a reversal of the order of December 4, 1944, defendant prosecutes a direct appeal, apparently on the assumption that a constitutional question is involved."

The opinion of the Supreme Court concludes:

"For the reason that neither the validity of a statute nor a construction of the constitution is involved, within the contemplation of section 75 of the Civil Practice Act, (Ill. Rev. Stat. 1943, chap. 110, par. 199,) the cause is transferred to the Appellate Court for the First District."

The appeal was docketed in this court and on the call of the docket noted for oral argument. As in the Supreme Court, so here, plaintiff did not appear. Defendant filed no other brief in this court. On the day set for oral argument she also did not appear. We are in some doubt as to what question is supposed to be before us for consideration. We gather from the brief of defendant in the Supreme Court that after the denial by the trial court of defendant's third petition to set aside the confession of judgment, defendant thought she had a further remedy under Section 72 of the Civil Practice Act. If the trial court erred in denying the motion to set aside the judgment by confession, defendant could have had the error corrected by an appeal under Section 77 of the Civil Practice Act (Smith Hurd Rev. Stat., Chap. 110, par. 201). However, if there was error, it was error of law not of fact, and Section 72 of the Civil Practice Act was not applicable. Neither motion in the nature of coram nobis nor coram vobis was available. Cycl. of Pleading and Practice, pp. 26-37. Jacobson v. Ashkinaze, 337 Ill. 141.

The order will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

rule. Making a reversal of the order of December 4, 1944, defendant presented a direct appeal, apparently on the assumption that a constitutional question is involved."

The opinion of the Supreme Court concludes:

"For the reason that neither the validity of a statute nor a construction of the constitution is involved, within the contemplation of section 75 of the Civil Practice Act (N.Y. Stat. 1943, Chap. 110, par. 138), the cause is transferred to the Appellate Court for the First District."

The appeal was docketed in this court and on the call of the docket noted for oral argument. As in the Supreme Court, so here, plaintiff did not appear. Defendant filed no other brief in this court. On the day set for oral argument she also did not appear. We are in some doubt as to what question is supposed to be before us for consideration. We gather from the brief of defendant in the Supreme Court that after the denial by the trial court of defendant's third petition to set aside the confession of judgment, defendant thought she had a further remedy under Section 75 of the Civil Practice Act. If the trial court erred in denying the motion to set aside the judgment by confession, defendant could have had the error corrected by an appeal under Section 75 of the Civil Practice Act (Smith v. Smith, 110, Chap. 110, par. 138). However, if there was error, it was error of law not of fact, and Section 75 of the Civil Practice Act was not applicable. Neither

motion in the name of coram nobis nor coram vobis was available. Cycl. of Law and Practice, pp. 28-37. Jacobson v. Jacobson, 337 Ill. 141.

The order will be affirmed.

AFFIRMED.

O'Connor and Fitzgerald, JJ., concur.

43729

329 I.A. 186¹

CHARLES BORIN, doing business as
AMERICAN MACHINE WORKS,
Appellee,

v.

NATIONAL METAL PRODUCTS CORP., a
corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$1600.00, entered on the finding of the court.

Plaintiff's action was to recover damages for failure of defendant to accept a machine known as a 3 spindle Landis bolt threader, according to the terms of a written order given by defendant to plaintiff March 10, 1945. The writing provided plaintiff should repair the machine and supply certain missing parts of it. Defendant paid \$500.00 to plaintiff on account at the time the contract was made.

Plaintiff's evidence tends to show that on March 30, 1945, he had completed the repairs and complied with other conditions of the order and tendered the completed machine to defendant at that time, but defendant did not accept it. Defendant denied the conditions had been complied with and filed a counterclaim to recover the \$500.00 deposited, with interest. The trial was by the court. The finding was for plaintiff on claim and counterclaim and judgment entered on the finding, as above stated.

On trial the written order was put in evidence. Plaintiff testified all repairs required had been made and all missing parts of the machine furnished according to the terms of the written record. He also testified he gave notice to the defendant of the completion of the terms and conditions of the contract and tendered the machine for delivery March

3391A 180

43722

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO

CHARLES B. BAIN, doing business as
AMERICAN MACHINE WORKS,
Appellee,

NATIONAL RETAIL PRODUCTS CO., a
corporation,
Appellant.

MR. PRESIDING JUDGE HANCOCK DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the

sum of \$1800.00, entered on the finding of the court.

Plaintiff's action was to recover damages for failure

of defendant to accept a machine known as a 3 spindle Landis

bolt threader, according to the terms of a written order

given by defendant to plaintiff March 10, 1945. The writing

provided plaintiff should repair the machine and supply certain

missing parts of it. Defendant paid \$500.00 to plaintiff on

account at the time the contract was made.

Plaintiff's evidence tends to show that on March 30,

1945, he had completed the repairs and complied with other

conditions of the order and tendered the completed machine

to defendant at that time, but defendant did not accept it.

Defendant denied the conditions had been complied with and

filed a counterclaim to recover the \$500.00 deposited, with in-

terest. The trial was by the court. The finding was for

plaintiff on claim and counterclaim and judgment entered on

the finding, as above stated.

On trial the written order was put in evidence.

Plaintiff testified all repairs required had been made and all

missing parts of the machine furnished according to the terms

of the written report. He also testified he gave notice to

the defendant of the completion of the terms and conditions

of the contract and tendered the machine for delivery March

2.

30, 1945. He said he gave notice by phone to Mr. Buckman of defendant company, in the absence of Mr. Leuthesser, president of defendant.

Defendant did not accept the machine but on April 21, 1945, wrote a letter to plaintiff "cancelling this order in its entirety". The letter does not claim that plaintiff had not complied with the terms of the written order. It says:

"This cancellation is due to the fact that our contract for which we were going to use this machine was cancelled. We, therefore, in turn must cancel all purchase orders against this contract."

The letter also asks the return of the \$500.00 deposited "inasmuch as it is impossible for us to use this equipment".

The theory of the defense and counterclaim is that the conditions of the written order had not been performed by plaintiff. The evidence on that issue is conflicting. A clear preponderance of it indicates plaintiff had performed all the conditions of the written order. Mr. Borin testified in detail and particularly to that effect. On the contrary, Mr. Leuthesser gave testimony (denied by Borin) that he saw the machine after the letter of cancellation had been sent, and that it had not been repaired or the parts supplied as agreed.

The trial judge made a short statement of the reason for his findings. He called attention to the fact that Mr. Buckman of defendant company, who, according to plaintiff's testimony, received notice the machine was ready for delivery March 30, 1945, was not produced as a witness. We quote a significant part of the record:

"The Court: I don't care but do you want me to be a little more frank?

Mr. Culver: Sir?

The Court: I will tell you I don't believe him."

30, 1945. He said he gave notice by phone to Mr. Buchanan of defendant company, in the name of Mr. Leutneser, president of defendant.

Defendant did not accept the machine but on April 31, 1945, wrote a letter to plaintiff "canceling this order in its entirety". The letter does not claim that plaintiff had not complied with the terms of the written order. It says:

"This cancellation is due to the fact that our contract for which we were going to use this machine was cancelled. We, therefore, in turn must cancel all purchase orders against this contract."

The letter also asks the return of the \$500.00 deposited "inasmuch as it is impossible for us to use this equipment". The theory of the defense and counterclaim is that the conditions of the written order had not been performed by plaintiff. The evidence on that issue is conflicting. A clear preponderance of it indicates plaintiff had performed all the conditions of the written order. Mr. Borin testified in detail and particularly to that effect. On the contrary, Mr. Leutneser gave testimony (denied by Borin) that he saw the machine after the letter of cancellation had been sent, and that it had not been returned or the parts supplied as agreed.

The trial judge made a short statement of the reason for his findings. He called attention to the fact that Mr. Buchanan of defendant company, who, according to plaintiff's testimony, received notice the machine was ready for delivery March 30, 1945, was not produced as a witness. He gave a significant part of the record:

"The Court: I don't care, but do you want me to be a little more frank?"

Mr. Oliver: Sir?

The Court: I will tell you I don't believe him."

3.

The reference was to the testimony of the president of defendant. The court saw and heard the witnesses. We have read the testimony. We are not disposed to disagree with the trial judge. This judgment is not against the manifest weight of the evidence. That is the controlling question on this appeal.

Defendant makes the point that plaintiff was not qualified as an expert witness to testify as to the machine and the repairs. That matter was largely in the discretion of the court. Bonate v. Peabody Coal Co., 248 Ill. 422; The People v. Jennings, 252 Ill. 534; Mauvaisterre Drainage and Levee District v. Wabash Ry. Co., 299 Ill. 299. Plaintiff testified as to his experience with machines of this kind. The court did not err in this respect.

The trial court saw and heard the witnesses. We will not substitute our own findings of fact for those of the trial court "unless the judgment is clearly against the manifest weight of the evidence". Mousette v. Monarch Life Ins. Co., 309 Ill. App. 224, 233. The amount of damages allowed is not questioned.

The judgment will be affirmed.

AFFIRMED.

O'Connor and Niemeyer, JJ., concur.

the reference was to the testimony of the president of defendant. The court saw and heard the witnesses, he have read the testimony. He was not disposed to disagree with the trial judge. His judgment is not against the manifest weight of the evidence. That is the controlling question on this appeal.

Defendant makes the point that plaintiff was not qualified as an expert witness to testify as to the machine and the repairs. That matter was largely in the discretion of the court. How to v. Leachy Coal Co., 248 Ill. 482; The People v. Jennings, 332 Ill. 324; Amvlatere v. Chicago and Lake District v. Lake Ry. Co., 270 Ill. 287. Plaintiff testified as to his experience with machines of this kind. The court did not err in this respect.

The trial court saw and heard the witnesses. We will not substitute our own findings of fact for those of the trial court "unless the judgment is clearly against the manifest weight of the evidence". Monette v. Monarch Life Ins. Co., 309 Ill. App. 234, 235. The amount of damages allowed is not questioned.

The judgment will be affirmed.

AFFIRMED.

O'Connor and Wisniewski, JJ., concur.

329 I.A. 186²

43484

B. M. PATTON,
Appellant,

v.

JACOB STANGLE, et al.,
Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing her complaint in chancery on motion of defendants.

The complaint, covering 43 pages and containing many unnecessary details and conclusions, is repetitious and confusing. Throughout the case plaintiff appeared pro se, and although at times she had the assistance of associate counsel, she appears to be the author of the complaint, of practically all of the motions presented in the trial court and to us, and probably of the abstract of record and briefs filed here. Although filed as a chancery suit, the complaint is entitled "Ejectment Action," and, as it states, is filed to clear the title to certain described real estate in Chicago.

The abstract is deficient and a violation of our rules. We have been obliged to go to the record to decide the case on the merits. The essential facts alleged by the complaint are, that on July 22, 1930 plaintiff and her sister became the owners by deed duly recorded of the real estate involved herein, being a lot improved by a 5-room brick bungalow and a 2-car frame garage, valued at \$8,500 and subject to a first mortgage of \$4,000 and a second mortgage originally of \$2,500, payable at the rate of \$40, and interest, per month; that on March 5, 1931 plaintiff and her sister filed a suit in the Circuit court of Cook county to clear the title to this real

9231A.186

42484

JACOB STANLEY, et al.,
Plaintiffs,
v.
B. E. TAYLOR, Defendant.

A REAL ESTATE
CIRCUIT COURT
COOK COUNTY.

THE JUSTICE HEREIN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an order dismissing her

complaint in chancery on motion of defendant.

The complaint, covering 43 pages and containing many

unnecessarily details and conclusions, is repetitious and

confusing. Throughout the case plaintiff appeared pro se,

and although at times she had the assistance of associate

counsel, she appears to be the author of the complaint, of

practically all of the motions presented in the trial court

and to us, and probably of the abstract of record and briefs

filed here. Although filed as a chancery suit, the complaint

is entitled "Ejectment Action," and, as it states, is filed

to clear the title to certain described real estate in Chicago.

The abstract is deficient and a violation of our rules.

We have been obliged to go to the record to decide the case

on the merits. The essential facts alleged by the complaint

are, that on July 22, 1930 plaintiff and her sister became the

owners by deed duly recorded of the real estate involved

herein, being a lot improved by a 5-room brick bungalow and a

2-car frame garage, valued at \$8,500 and subject to a first

mortgage of \$4,000 and a second mortgage originally of \$2,500,

payable at the rate of \$40, and interest, per month; that on

March 5, 1931 plaintiff and her sister filed a suit in the

Circuit court of Cook county to clear the title to this real

2.

estate; that on January 27, 1932 Thomas Muscato, who had previously conveyed the property to plaintiff and her sister, placed in possession of the premises Anton Bilik and his wife, Cleo Bilik, at a monthly rental of \$35 from February 1, 1932 to July 1, 1932. June 23, 1932 defendant Jacob Stangle, claiming to be the owner of the first mortgage note of \$4,000, filed in the Superior court of Cook county a suit to foreclose the trust deed securing the note. Plaintiff was made a defendant, filed her appearance and answer, the case was referred to Benjamin P. Epstein, master in chancery, the complaint/alleging ^{herein} that "the said Benjamin P. Epstein was never duly certified as master in chancery in the above cause, for failure of said court to sign and certify the said affidavit and official bond of the said Benjamin P. Epstein." A decree of foreclosure was entered, a sale had, resulting in a deficiency of \$964.10, and on January 23, 1933 an order was entered "approving said sale, deficiency and distribution." Pending this proceeding Stangle procured in the Municipal court of Chicago judgment for possession of the premises and for \$35 claimed to be due him as rent. Within 30 days of the entry of the judgment plaintiff filed a motion to vacate the judgment, which was denied. She also filed a second motion for the same purpose, and this was denied. An injunction order was entered in the foreclosure proceeding restraining plaintiff and her sister from going upon, into or in the said premises. No appeals were taken from these orders or from the decree in/^{the} foreclosure proceeding. There was no redemption from the foreclosure sale. The period of redemption expired April 14, 1934. On March 19, 1934 and October 25, 1934 temporary injunctions were entered in the foreclosure proceeding restraining plaintiff from taking certain action. On May 8, 1936 these injunctions were made permanent.

estate; that on January 27, 1932 Thomas Muscato, who had previously conveyed the property to plaintiff and her sister, placed in possession of the premises Anton Bilik and his wife, Gles Bilik, at a monthly rental of \$55 from February 1, 1932 to July 1, 1932. June 22, 1932 defendant Jacob Stangle, claiming to be the owner of the first mortgage note of \$4,000, filed in the Superior Court of Cook County a suit to foreclose the trust deed securing the note. Plaintiff was made a defendant, filed her answer and answer, the case was referred to Benjamin F. Epstein, master in chancery, the complaint alleging that "the said Benjamin F. Epstein was never duly certified as master in chancery in the above cause, for failure of said court to sign and certify the said affidavit and official bond of the said Benjamin F. Epstein." A decree of foreclosure was entered, a sale had, resulting in a deficiency of \$264.10, and on January 23, 1933 an order was entered "approving said sale, deficiency and distribution." Pending this proceeding Stangle appeared in the Municipal Court of Chicago judgment for possession of the premises and for \$55 claimed to be due him as rent. Within 30 days of the entry of the judgment plaintiff filed a motion to vacate the judgment, which was denied. She also filed a second motion for the same purpose, and this was denied. An injunction order was entered in the foreclosure proceeding restraining plaintiff and her sister from going upon, into or in the said premises. No appeals were taken from these orders or from the decree in foreclosure proceeding. There was no redemption from the foreclosure sale. The period of redemption expired April 14, 1934. On March 19, 1934 and October 25, 1934 temporary injunctions were entered in the foreclosure proceeding restraining plaintiff from taking certain action. On May 6, 1935 these injunctions were made permanent.

3.

The latter order was reversed on appeal to this court (No. 39154, abst.) on the ground that the trial court was without jurisdiction.

The complaint was not filed until July 14, 1944.

The master in chancery, Benjamin P. Epstein, the surety on his bond, and Fred V. Maguire, his successor as master in chancery are made parties defendant, as is the Chicago Title and Trust Co., which issued certain guaranty policies. A number of individuals are also named as defendants. We have not recited the allegations of other proceedings and of numerous details of the acts of plaintiff, Stangle and other defendants. The prayer for relief, in so far as we can interpret it, asks for the correction of void orders and proceedings in the foreclosure proceedings; "that the said official bond of the said Benjamin P. Epstein be forfeited and payable to her (plaintiff) as the damaged and injured person in the above cause"; and "for any and all further relief to which she (plaintiff) may be entitled under the law." Plaintiff's interest in the premises involved herein was terminated at the expiration of the period of redemption from the foreclosure sale, April 14, 1934, and the decree in that case, not having been appealed from, is conclusive. People v. Sterling, 357 Ill. 354, 362; Baker v. Brown, 372 Ill. 336, 340.

The order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., concurs.
O'Connor, J., took no part.

The latter order was reversed on appeal to this court (No. 33154, 1944) on the ground that the trial court was

without jurisdiction.

The complaint was not filed until July 14, 1944.

The master in chancery, Benjamin P. Epstein, the surety on his bond, and Fred V. McGuire, his successor as master in chancery, are made parties defendant, as is the Chicago Title and Trust

Co., which issued certain guaranty policies. A number of individuals are also named as defendants. We have not recited

the allegations of other proceedings and of numerous details

of the acts of plaintiff, Stangle and other defendants. The prayer for relief, in as far as we can interpret it, asks for

the correction of void orders and proceedings in the fore-

closure proceedings; "that the said official bond of the said

Benjamin P. Epstein be forfeited and payable to her (plaintiff)

as the damaged and injured person in the above cause"; and

"for any and all further relief to which she (plaintiff) may

be entitled under the law." Plaintiff's interest in the pre-

mise involved herein was terminated at the expiration of the

period of redemption from the foreclosure sale, April 14, 1934,

and the decree in that case, not having been appealed from,

is conclusive. People v. Epstein, 357 Ill. 354, 302; Baker v.

Brown, 378 Ill. 336, 340.

The order appealed from is affirmed.

ATTORNEYS.

Matchett, P. J., concurring.
O'Connor, J., took no part.

43642

MARY DEMSKE,
Appellant,
v.
JOHN GREVIE,
Appellee.

329 I.A. 187

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

A
378

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a verdict of not guilty in her action for personal injuries sustained as the result of a collision between the automobile in which she was riding with her husband as a guest, and an automobile of the defendant on a busy street in Chicago in the early morning rush hour when many of the drivers of automobiles and their passengers were going to work. She contends that the verdict is against the manifest weight of the evidence and that the court erred in instructing the jury.

The automobile in which plaintiff was riding was following the car of defendant. Her theory is that defendant negligently came to a sudden stop without giving the signals required by sections 65, 66 and 67 of the Uniform Act Regulating Traffic On Highways (Ill. Rev. Stat. 1945, chap. 95 1/2, pars. 162, 163, 164). Defendant contends that he was compelled to make an emergency stop because of the sudden stopping and collision of the three cars immediately in front of him; that he succeeded in stopping without coming in contact with the car in front of him until the driver of plaintiff's car ran into him and threw his car forward; that the proximate cause of the collision between the car in which plaintiff was riding and his car was the negligence of the driver of plaintiff's car, or an accident occurring without the fault of either driver.

322 I.A. 187

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MARY DEMAY,
Appellant,
v.
JOHN ORVILLE,
Appellee.

MR. JUSTICE NICHOLS DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a verdict of not guilty in her action for personal injuries sustained as the result of a collision between the automobile in which she was riding with her husband as a guest, and an automobile of the defendant on a busy street in Chicago in the early morning rush hour when many of the drivers of automobiles and their passengers were going to work. She contends that the verdict is against the manifest weight of the evidence and that the court erred in instructing the jury.

The automobile in which plaintiff was riding was following the car of defendant. Her theory is that defendant negligently came to a sudden stop without giving the signals required by sections 65, 66 and 67 of the Uniform Act Regulating Traffic On Highways (Ill. Rev. Stat. 1945, chap. 38 1/2, pars. 162, 163, 164). Defendant contends that he was compelled to make an emergency stop because of the sudden stopping and collision of the three cars immediately in front of him; that he succeeded in stopping without coming in contact with the car in front of him until the driver of plaintiff's car ran into him and threw his car forward; that the proximate cause of the collision between the car in which plaintiff was riding and his car was the negligence of the driver of plaintiff's car, or an accident occurring without the fault of either driver.

Plaintiff, her husband and the driver of the car in which plaintiff was riding testified in support of her theory. The defendant, the drivers of the three cars which collided in front of him, a passenger in defendant's car and two police officers testified on behalf of the defendant. There is nothing in the record indicating greater credibility or less interest on the part of plaintiff's witnesses than the witnesses called by defendant. No witness testified against his interest. The jury, which is primarily the judge of the credibility of the witnesses, accepted the testimony of those called by the defendant. The trial court, who also heard and saw the witnesses who testified, has approved the verdict. It is not contrary to the manifest weight of the evidence and will not be disturbed by us. Goldstein v. Metropolitan Life Ins. Co., 324 Ill. App. 168, 174.

The transcript of proceedings fails to show by whom the various instructions complained of were offered. It merely recites that "The court gave the following instructions to the jury." The duty of showing that instructions complained of by plaintiff were offered by the defendant rested upon the plaintiff, who prepared the report of proceedings. We are not permitted to examine the instructions and judge from the context as to which party offered the instruction, and therefore cannot consider assigned errors relating to instructions. Horvat v. Opas, 315 Ill. App. 229, 234; Price v. Bailey, 265 Ill. App. 358, 364-5; Neufeld v. Rodiminski, 41 Ill. App. 144, 146.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.
O'Connor, J., took no part.

Plaintiff, her husband and the driver of the car in which plaintiff was riding testified in support of her theory. The defendant, the driver of the three cars which collided in front of him, a passenger in defendant's car and two police officers testified on behalf of the defendant. There is nothing in the record indicating greater credibility or less interest on the part of plaintiff's witnesses than the witnesses called by defendant. No witness testified against his interest. The jury, which is primarily the judge of the credibility of the witnesses, accepted the testimony of those called by the defendant. The trial court, who also heard and saw the witnesses who testified, has approved the verdict. It is not contrary to the manifest weight of the evidence and will not be disturbed by us. Goldstein v. Metropolitan Life Ins. Co., 324 Ill. App. 168, 174.

The transcript of proceedings fails to show by whom the various instructions complained of were offered. It merely recites that "The court gave the following instructions to the jury." The duty of showing that instructions complained of by plaintiff were offered by the defendant rested upon the plaintiff, who prepared the report of proceedings. We are not permitted to examine the instructions and judge from the context as to which party offered the instruction, and therefore cannot consider assigned errors relating to instructions. Horvat v. Ocas, 315 Ill. App. 320, 324; Price v. Bailey, 325 Ill. App. 328, 334-5; Kentel v. Redwin, 41 Ill. App. 144, 148. The instruction is affirmed.

AFFIRMED.

Macchett, P. J., concurs.
G'Connor, J., took no part.

43689

CLAIRE B. BORIN.
Appellee,
v.
NATHAN BORIN,
Appellant.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

329 I.A. 188

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order finding him in contempt of court for failure to pay to plaintiff the sum of \$1,250 found to be due under an order of court for payment of alimony, and committing him to the county jail for a period not to exceed six months unless he sooner purged himself of the contempt by paying the amount specified in the order.

June 29, 1945 an order was entered directing the defendant to pay \$200 per month - the rental of the apartment occupied by plaintiff, and in addition thereto the sum of \$150 per week toward the support of plaintiff and the minor child of the parties, and the further sum of \$1,500 as temporary attorney's fees. September 14, 1945 plaintiff filed the petition upon which the order appealed from was based. Defendant answering, denied that he was indebted to the plaintiff for temporary alimony, and averred that between the entry of the order for temporary alimony and July 26, 1945 he had paid to plaintiff or on her account the sum of \$4,148.67, including \$1,300 paid directly to plaintiff, \$1,650 to plaintiff's brother for moneys claimed to have been advanced by him to plaintiff, and the balance in payment of bills incurred by plaintiff prior to the order for alimony. Defendant also filed a petition, alleging that plaintiff had failed to comply with the order of the court permitting him to visit with and have temporary custody of their minor child; had used improper language in the presence of the child

CLAUDE B. BORN.
Appellant.
v.
NATHAN BORN,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

3231.A.188

MR. JUSTICE MICHAEL DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order finding him in contempt of court for failure to pay to plaintiff the sum of \$1,250 found to be due under an order of court for payment of alimony, and committing him to the county jail for a period not to exceed six months unless he sooner purged himself of the contempt by paying the amount specified in the order.

June 23, 1945 an order was entered directing the defendant to pay \$200 per month - the rental of the apartment occupied by plaintiff, and in addition thereto the sum of \$1.50 per week toward the support of plaintiff and the minor child of the parties, and the further sum of \$1,200 as temporary attorney's fees. September 14, 1945 plaintiff filed the petition upon which the order appealed from was based. Defendant answering, denied that he was indebted to the plaintiff for temporary alimony, and asserted that between the entry of the order for temporary alimony and July 26, 1945 he had paid to plaintiff or on her account the sum of \$4,142.67, including \$1,300 paid directly to plaintiff, \$1,650 to plaintiff's brother for money claimed to have been advanced by him to plaintiff, and the balance in payment of bills incurred by plaintiff prior to the order for alimony. Defendant also filed a petition, alleging that plaintiff had failed to comply with the order of the court permitting him to visit with and have temporary custody of their minor child; had used improper language in the presence of the child

2.

tending to estrange the child from defendant, and that plaintiff had on various occasions created scenes and commotions at the hotel where the defendant temporarily resided, and asking for an injunction against plaintiff.

Plaintiff filed a sworn answer and reply to defendant's petition and answer, in which she set up that \$1,000 was then due her; that defendant had made no payment since August 23; that prior to the filing of the complaint defendant had paid the rental on the apartment and all other fixed charges, and provided her with \$300 per week for her allowance; that he ceased providing her with the allowance upon the filing of the complaint, so that she was obliged to make various loans from her brother, and make purchases on charge accounts which were unpaid; that the order of June 29, 1945 made no provisions for these obligations; that subsequent to the filing of the complaint defendant sought to effect a reconciliation, and to that end he offered to and did pay the obligations incurred by plaintiff and listed in defendant's answer; that such payments were never intended to be in discharge of his alimony obligations as fixed in the order of the court; that defendant further offered to give plaintiff \$10,000 in cash if she would seriously consider a reconciliation and dismiss her complaint; that the offer was refused; she denies that she wilfully failed and refused to permit defendant to visit with the child, and denies that she created scenes and commotions at defendant's hotel, and charges that, notwithstanding defendant's protestations of love and affection and his great efforts to become reconciled, she discovered that on July 27, 1945 the defendant was entertaining a female person in his room at the hotel and that a scene followed. To this answer and reply of plaintiff, defendant filed a reply insisting on his right to credit for the sums paid on plaintiff's behalf, as alleged in his answer, and alleging that after the entry of the order for payment of

tending to estrange the child from defendant, and that plaintiff had on various occasions created scenes and commotions at the hotel where the defendant temporarily resided, and asking for an injunction against plaintiff.

Plaintiff filed a sworn answer and reply to defendant's petition and answer, in which she set up that \$1,000 was then due her; that defendant had made no payment since August 23; that prior to the filing of the complaint defendant had paid the rental on the apartment and all other fixed charges, and provided her with \$500 per week for her allowance; that he ceased providing her with the allowance upon the filing of the complaint, so that she was obliged to make various loans from her brother, and make purchases on charge accounts which were unpaid; that the order of June 23, 1945 made no provision for these obligations; that subsequent to the filing of the complaint defendant sought to effect a reconciliation, and to that end he offered to and did pay the obligations incurred by plaintiff and listed in defendant's answer; that such payments were never intended to be in discharge of his alimony obligations as fixed in the order of the court; that defendant further offered to give plaintiff \$10,000 in cash if she would seriously consider a reconciliation and dismiss her complaint; that the offer was refused; and denies that she willfully failed and refused to permit defendant to visit with the child, and denies that she created scenes and commotions at defendant's hotel, and charges that, notwithstanding defendant's protestations of love and affection and his great efforts to become reconciled, she discovered that on July 27, 1945 the defendant was entertaining a female person in his room at the hotel and that a scene followed. To this answer and reply of plaintiff, defendant filed a reply insisting on his right to credit for the sums paid on plaintiff's behalf, as alleged in his answer, and alleging that after the entry of the order for payment of

3.

alimony he and plaintiff cohabited, and during the succeeding month took trips together and were entirely reconciled, except that the parties maintained separate homes; that during that time he continued to pay plaintiff alimony in accordance with the order of the court, and advanced on her account the sums claimed by him, and that by reason of the cohabitation between the parties and the resumption of marital functions, the order for alimony ceased and became a nullity. On October 18, 1945 the order appealed from was entered, the plaintiff having filed on the preceding day a supplemental affidavit alleging the amount due her to be \$1,250.

The trial court heard the testimony of the plaintiff and defendant as to the conditions under which the payments on plaintiff's behalf were made, and accepted plaintiff's version of the transaction. This finding is not against the manifest weight of the evidence, and is controlling on appeal. Defendant, however, contends that because he alleges in his pleadings that the parties cohabited during the month following the entry of the order, the order became a nullity and no payments subsequently due could be enforced, and that the court heard no testimony on this part of the case. From the record it appears that the proceedings were conducted with a town-meeting informality, shown by the various records before us to have been adopted as the practice in divorce cases. Each counsel made statements of his client's position. Plaintiff and defendant were called at the request of the court and examined as to the circumstances relating to payments made by defendant on behalf of plaintiff. Neither side offered any other testimony in support of the allegations of the pleadings, or asked that evidence be produced by the opponent. Plaintiff does not deny by answer or reply the allegations of defendant of cohabitation during the month following the entry of the alimony order. Defendant does not deny by any pleading the entertaining of

alimony he and plaintiff conspired, and during the succeeding month took trips together and were entirely reconciled, except that the parties maintained separate homes; that during that time he continued to pay plaintiff alimony in accordance with the order of the court, and advanced on her account the same claimed by him, and that by reason of the cohabitation between the parties and the resumption of marital functions, the order for alimony ceased and became a nullity. On October 18, 1945 the order appealed from was entered, the plaintiff having filed on the preceding day a supplemental affidavit alleging the amount due her to be \$1,850.

The trial court heard the testimony of the plaintiff and defendant as to the conditions under which the payments on plaintiff's behalf were made, and accepted plaintiff's version of the transaction. This finding is not against the manifest weight of the evidence, and is controlling on appeal. Defendant, however, contends that because he alleges in his pleadings that the parties conspired during the month following the entry of the order, the order became a nullity and no payments independently due could be enforced, and that the court heard no testimony on this part of the case. From the record it appears that the proceedings were conducted with a town-meeting informality, and by the various records before us to have been adopted as the practice in divorce cases. Each counsel made statements of his client's position. Plaintiff and defendant were called at the request of the court and examined as to the circumstances relating to payments made by defendant on behalf of plaintiff. Neither side offered any other testimony in support of the allegations of the pleadings, or asked that evidence be produced by the opponent. Plaintiff does not deny by answer or reply the allegations of defendant of cohabitation during the month following the entry of the alimony order. Defendant does not deny by any pleading the entering of

4.

another woman in his hotel room on July 27 which resulted in a scene and, obviously, terminated all negotiations for reconciliation. Whatever may be the effect of cohabitation and temporary reconciliation upon an order for the payment of temporary alimony, it is fundamental that the party urging such reconciliation must have acted in absolute good faith. Such good faith on the part of the defendant is wholly lacking in this case, and his admitted conduct with another woman on July 27th destroyed whatever advantage he may have gained by his prior attempts to effect a reconciliation.

The order appealed from is affirmed.

AFFIRMED.

Matchett, P. J., concurs.
O'Connor, J., took no part.

another woman in his hotel room on July 27 which resulted in a scene and, eventually, terminated all negotiations for reconciliation. Whatever may be the effect of cohabitation and temporary reconciliation upon an order for the payment of temporary alimony, it is fundamental that the party urging such reconciliation must have acted in absolute good faith. Such good faith on the part of the defendant is wholly lacking in this case, and his admitted conduct with another woman on July 27th destroyed whatever advantage he may have gained by his prior attempt to effect a reconciliation.

The order appealed from is affirmed.

AFFIRMED.

Macdonald, J., concurring.
O'Connor, J., took no part.

43697

LOUISE SWANSON,
Appellant,

v.

PROGRESS ELECTRIC COMPANY,
a corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

329 I.A. 188²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a verdict of not guilty in her action for personal injuries alleged to have resulted from the negligent operation of defendant's automobile when being driven past a street car loading zone in Cermak Road immediately west of Wabash avenue in Chicago.

She contends that her case was prejudiced by the improper conduct of defendant's counsel in asking an expert medical witness called by her, on cross-examination, to conduct before the jury the test upon which he based his testimony that plaintiff was suffering from double vision - the principal injury complained of, and counsel's argument to the jury on the failure to have such tests made. Defendant contends that there was nothing improper in the conduct of its counsel, and that there was no evidence before the jury upon which to base a verdict for plaintiff.

No witness saw plaintiff in contact with defendant's automobile, and the evidence upon which she relies is wholly circumstantial. Cermak Road is an extremely wide street; the street car tracks for east and westbound traffic are located in the northerly portion of the street; immediately south of the eastbound track and just west of Wabash avenue, a north and south street, is a loading zone rising above the pavement 4 to 6 inches, about 3 to 4 feet in width and extending parallel with the car tracks about the length of one and one-half street cars; immediately to the south of the loading zone is a plainly

LOUISE SWANSON,
Appellant,
v.
PROGRESS ELECTRIC & RAILWAY,
a corporation,
Appellee.

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

3231.A.188

MR. JUSTICE NICHOLS DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a verdict

of not guilty in her action for personal injuries alleged to have resulted from the negligent operation of defendant's automobile when being driven past a street car loading zone in German Road immediately west of Wabash Avenue in Chicago.

The contention that her case was prejudiced by the

improper conduct of defendant's counsel in asking an expert medical witness called by her, on cross-examination, to conduct before the jury the test upon which he based his testimony

that plaintiff was suffering from double vision - the principal injury complained of, and counsel's argument to the jury on the failure to have such tests made. Defendant contends that there was nothing improper in the conduct of its counsel, and that there was no evidence before the jury upon which to base

a verdict for plaintiff.

No witness saw plaintiff in contact with defendant's

automobile, and the evidence upon which she relies is wholly circumstantial. German Road is an extremely wide street; the street car tracks for east and westbound traffic are located in the northernly portion of the street; immediately south of the eastbound track and just west of Wabash Avenue, a north

and south street, is a loading zone rising above the pavement 4 to 6 inches, about 3 to 4 feet in width and extending parallel with the car tracks about the length of one and one-half street cars; immediately to the south of the loading zone is a plainly

2.

marked traffic lane for westbound vehicular traffic.

Plaintiff testified that on the morning of her injury she alighted from an elevated train at the Germak Road station and walked to the loading zone near Wabash avenue for the purpose of taking a street car to her place of employment east of Wabash avenue; this loading zone was crowded; plaintiff was standing 10 or 15 feet from the bumper at the west end of the zone and at the south edge of the platform; an eastbound street car, heavily loaded, stopped; plaintiff did not attempt to board this car; she turned her head to look west for a second eastbound car; she did not change the position of her feet nor step off the platform; she did not see an automobile going west. That is all she remembers until she "came to" in the hospital. She does not know what struck her.

Plaintiff called three of her co-workers as occurrence witnesses. Mrs. Von Tepser testified that she was on the loading platform and saw plaintiff to the west of her, but did not recall how close; that the first street car stopped, with the rear platform about where she was standing, and the front end at the east end of the zone; that she heard a thud and felt somebody against her right leg, and she saw plaintiff on the street with a part of her foot on the loading platform; that just before she heard the thud there had been a surge of people toward the loading platform of the street car, causing that part of the loading zone where she and plaintiff stood to be crowded; that she did not see exactly what plaintiff did the moment before she got hurt; that she (the witness) was standing about 6 inches from the south edge of the loading zone; that she could not gauge how close the automobile was to the zone; it stopped to the west. Mrs. Heilman testified that the first street car stopped practically in front of her; she walked to the east a few steps and got on the rear platform of the car; when standing on the loading zone Mrs. Von Tepser was about 3

marked traffic lanes for westbound vehicular traffic.

Plaintiff testified that on the morning of her injury

she alighted from an elevated train at the German Road station and walked to the loading zone near Ashland Avenue for the purpose of taking a street car to her place of employment east of Ashland Avenue; this loading zone was crowded; Plaintiff

was standing 10 or 15 feet from the bumper at the west end of

the zone and at the south edge of the platform; an eastbound street car, heavily loaded, stopped; Plaintiff did not attempt

to board this car; she turned her head to look west for a

second eastbound car; she did not change the position of her feet nor step off the platform; she did not see an automobile going west. That is all she remembers until she "came to" in

the hospital. She does not know what struck her.

Plaintiff called three of her co-workers as witnesses

witnesses. Mrs. Von Taper testified that she was on the

loading platform and saw Plaintiff to the west of her, but did

not recall how close; that the first street car stopped, with

the rear platform about where she was standing, and the front

end at the east end of the zone; that she heard a third and

felt somebody against her right leg, and she saw Plaintiff on

the street with a part of her foot on the loading platform; that

just before she heard the third there had been a surge of people

toward the loading platform of the street car, causing that

part of the loading zone where she and Plaintiff stood to be

crowded; that she did not see exactly what Plaintiff did the

moment before she got hurt; that she (the witness) was standing

about 6 inches from the south edge of the loading zone; that

she could not judge how close the automobile was to the zone;

it stopped to the west. Mrs. Weisman testified that the first

street car stopped practically in front of her; she walked

to the east a few steps and got on the rear platform of the car;

when standing on the loading zone Mrs. Von Taper was about 3

3.

feet and the plaintiff about 6 feet to the west of the witness; she got off the street car when plaintiff fell; the automobile going west was about 8 inches from the loading zone - very close; plaintiff fell about 20 or 25 feet from the west end of the zone. Mrs. Cleveland testified that she was standing at the west end of the loading zone and plaintiff was 4 to 6 feet east of her; the witness heard a scream, turned around, and plaintiff was lying behind her; she did not see the automobile at any time outside the white lines on the pavement.

Defendant called the driver of the automobile, a boy 17 years of age; he had a driver's license, had driven for the defendant three or four months and was familiar with the place where the accident occurred. He testified that it was a bright day; that there was no dirt on his windshield; that he started up about 20 miles an hour east of Wabash avenue and did not slow down; that he was driving about two feet from the safety island; that no part of his car that he could see came in contact with anyone; when he had passed a little more than half the length of the zone he heard a thump on the side of the car; he stopped to see what was the matter. Defendant called two police officers who examined defendant's car shortly after the accident. Officer O'Rourke testified that there was a brush mark on the right side of the car at the door, as if an object had brushed against the door below the handle of the car; that it was pretty hard to identify. Officer Coughlin testified that he turned the car into the sun at an angle and saw a light brush mark on the outside of the right front fender, becoming heavier as it proceeded back toward the middle of the right door, and was about 8 inches wide at the heaviest part just below the handle of the front door.

If plaintiff and defendant's driver were telling the truth, the accident could not have happened. No witness saw the automobile extending over any part of the loading zone.

feet and the plaintiff about 6 feet to the west of the witness; she got off the street car when plaintiff fell; the automobile going west was about 8 inches from the loading zone - very close; plaintiff fell about 10 or 25 feet from the west end of the zone. Mrs. Cleveland testified that she was standing at the west end of the loading zone and plaintiff as it to 6 feet east of her; the witness heard a scream, turned around, and plaintiff was lying behind her; she did not see the automobile at any time outside the white lines on the pavement.

Defendant called the driver of the automobile, a boy 17 years of age; he had a driver's license, had driven for the defendant three or four months and was familiar with the place where the accident occurred. He testified that it was a bright day; that there was no dirt on his windshield; that he started up about 50 miles an hour east of Washburn Avenue and did not slow down; that he was driving about two feet from the safety island; that no part of his car that he could see came in contact with anyone; that he had passed a little more than half the length of the zone he heard a thump on the side of the car; he stopped to see what was the matter. Defendant called two police officers who examined defendant's car shortly after the accident. Officer O'Rourke testified that there was a brush mark on the right side of the car at the door, as if an object had brushed against the door below the handle of the car; that it was pretty hard to identify. Officer Cunningham testified that he turned the car into the lane at an angle and saw a light brush mark on the outside of the right front fender, becoming heavier as it proceeded back toward the middle of the right door, and was about 8 inches wide at the heaviest part just below the handle of the front door.

If plaintiff and defendant's driver were telling the truth, the accident could not have happened. No witness saw the automobile extending over any part of the loading zone.

4.

If plaintiff was standing still when she came in contact with defendant's automobile, which was traveling west, it seems improbable that she would have been thrown to the east against Mrs. Von Tepser, who, as she and Mrs. Heilman testified, was standing to the east of plaintiff. It may be that the driver of defendant's automobile swerved over and struck plaintiff on the loading zone. Plaintiff may have stepped off the zone, or she may have been pushed off with the surging of the crowd toward the rear platform of the street car. A fertile mind may suggest other conjectures as to how the accident happened. There is no definite proof. No presumption of negligence of the defendant or due care of the plaintiff arises from the fact that an accident happened. Huff v. Illinois Central R. Co., 362 Ill. 95, 101. No theory as to how the accident happened can be established by circumstantial evidence unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can reasonably be drawn from them. Ohio Bldg. Vault Co. v. Industrial Board, 277 Ill. 96, 102; Condon v. Schoenfeld, 214 Ill. 226, 230. The burden of proof was upon plaintiff to establish plaintiff's exercise of due care and the negligence of defendant. There being a total failure to establish these two essentials of her claim, no other verdict would have been reasonably possible, and the alleged improper conduct of defendant's counsel would not justify reversal of the judgment. People v. Kennay, 391 Ill. 572, 577. Therefore we do not discuss it except to say that the court ruled correctly on the objection to defendant's cross-examination of plaintiff's expert witness as to his willingness to conduct a test of plaintiff's eyes in the presence of the jury. Chicago R. I. & P. Ry. Co. v. Benson, 352 Ill. 195, 201; People v. Scott, 326 Ill. 327, 347; Mattice v. Klawans, 312 Ill. 299, 307; Parker v. Enslow, 102 Ill. 272, 279. And plaintiff having

if plaintiff was standing still when she came in contact with defendant's automobile, which was traveling west, it seems improbable that she could have been thrown to the east against Mrs. Von Reppert, who, as she and Mrs. Reppert testified, was standing to the east of plaintiff. It may be that the driver of defendant's automobile swerved over and struck plaintiff on the leading knee. Plaintiff may have stepped off the knee, or she may have been pushed off with the surging of the crowd toward the rear platform of the street car. A fertile mind may suggest other conjectures as to how the accident happened. There is no definite proof. No presumption of negligence of the defendant or due care of the plaintiff arises from the fact that an accident happened. Hill v. Illinois Central R. Co., 252 Ill. 55, 101. No theory as to how the accident happened can be established by circumstantial evidence unless the facts relied upon are of such a nature and so related to each other that it is the only conclusion that can reasonably be drawn from them. Ohio R.R. v. Vanit Co., v. Industrial Board, 177 Ill. 98, 102; Gordon v. Schoenfeld, 214 Ill. 288, 290. The burden of proof was upon plaintiff to establish plaintiff's exercise of due care and the negligence of defendant. There being a total failure to establish these two essentials of her claim, no other verdict could have been reasonably possible, and the alleged improper conduct of defendant's counsel would not justify reversal of the judgment. People v. ..., 251 Ill. 572, 577. Therefore we do not dissent. It ceased to say that the court ruled correctly on the objection to defendant's cross-examination of plaintiff's expert witness as to his ability to conduct a test of plaintiff's eyes in the presence of the jury. Chicago R. I. & N. Ry. Co. v. ..., 251 Ill. 198, 201; People v. Scott, 256 Ill. 287, 287; ... v. ..., 212 Ill. 299, 307; ... v. ..., 198 Ill. 275, 276. And plaintiff having

5.

failed to object to the argument of defendant's counsel,
she cannot now complain. Forest Preserve Dist. v. Chicago
T. & T. Co., 351 Ill. 48, 56; Brant v. Chicago & Alton R. Co.,
294 Ill. 606, 622.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.
O'Connor, J., took no part.

failed to object to the argument of defendant's counsel,
and cannot now complain. People v. Detective
T. & I. Co., 351 Ill. 46, 58; Grant v. Chicago & Alton R. Co.,
234 Ill. 606, 608.
The judgment is affirmed.

AFFIRMED.

Mathew, P. J., concurs.
O'Connor, J., took no part.

43711

JOSEPH DUSATKO,
Appellee,

v.

CHARLES PLETKA,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

329 I.A. 189

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$900 entered in favor of plaintiff upon a verdict of a jury in his action for personal injuries. No complaint is made in respect to the rulings of the court on evidence or instructions. No question is raised as to the amount of the damages. Defendant's contention is that the trial court should have directed a verdict, or the judgment should be reversed and the cause remanded because the verdict was contrary to the manifest weight of the evidence.

Plaintiff and defendant were the only occurrence witnesses. The incident under consideration occurred on the morning of December 6, 1943 at about 7 o'clock, at the corner of 26th street and Austin boulevard, Cicero, Illinois; it was dark and there was a heavy rain; both plaintiff and defendant were going to work; plaintiff left his home on the north side of 26th street, an east and west street, several blocks east of Austin boulevard, a north and south street, and walked to the intersection of the streets and started across Austin boulevard. Defendant, alone in his automobile, was approaching the intersection from the south on Austin boulevard. Plaintiff testified that when he got to the corner he saw the traffic control lights were green for east and west traffic, and started across Austin boulevard on the north crosswalk of 26th street; that before starting across he saw an automobile about 100 feet to the south, and did not see it again until it was about 20 feet from him;

43711

JOSEPH DUBATKO,
Appellee,

v.

CHARLES PLATT,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

3231 A. 189

MR. JUSTICE ... DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of \$500 entered in favor of plaintiff upon a verdict of a jury in his action for personal injuries. No complaint is made in respect to the rulings of the court on evidence or instructions. No question is raised as to the amount of the damages. Defendant's contention is that the trial court should have directed a verdict, or the judgment should be reversed and the cause remanded because the verdict was contrary to the manifest weight of the evidence. Plaintiff and defendant were the only occurrence witnesses.

The incident under consideration occurred on the morning of December 6, 1948 at about 7 o'clock, at the corner of 26th street and Austin boulevard, Cicero, Illinois; it was dark and there was a heavy rain; both plaintiff and defendant were going to work; plaintiff left his home on the north side of 26th street, and east and west street, several blocks east of Austin boulevard, a north and south street, and walked to the intersection of the streets and started across Austin boulevard. Defendant, alone in his automobile, was approaching the intersection from the south on Austin boulevard. Plaintiff testified that when he got to the corner he saw the traffic control lights were green for east and west traffic, and started across Austin boulevard on the north crosswalk of 26th street; that before starting across he saw an automobile about 100 feet to the south, and did not see it again until it was about 20 feet from him;

2.

that he stepped back but it was too late and he was struck by the car. Defendant testified that his car had one windshield wiper on the left side; that he was driving about 20 miles an hour, and when about half a block from the intersection the lights changed to green for north and south; that it was raining and you could not see any distance; that when he was entering 26th street at the south side he could not exactly see any people on the northeast corner; that he never saw any person in front of his car, but never looked at the northeast corner; that when about 12 or 14 feet north of the crossing "I seen something like if somebody threw something from the side"; he stopped his car and found plaintiff lying in the street. A passer-by testified that plaintiff was lying 8 or 10 feet north of the north walk of 26th street. The handle on the right door of defendant's car was knocked off and the glass in this door cracked; there was a dent in the right front fender. Defendant and his witnesses say that this dent had been there for some time and was rusty; a police officer testified he saw no rust, but a witness for defendant says that in a conversation with defendant's counsel the officer had admitted that the dent showed rust.

In view of the conflict in the evidence as to which of the parties had the green light and as to whether the plaintiff came in contact with defendant's car on the north crosswalk or a considerable distance to the north, the court would not have been justified in directing a verdict. Bailey v. Robison, 233 Ill. 614, 616. The guilt or innocence of the defendant was a question of fact to be determined by the jury. The trial judge, who heard and saw the witnesses, approved the verdict and entered judgment. We cannot disturb his action unless the verdict is clearly and manifestly against the weight of the evidence. Read v. Cummings, 324 Ill. App. 607; Mueth v. Jaska, 302 Ill. App. 289, 294. The determination of the questions

that he stopped back, but it was too late and he was struck by the car. Defendant testified that his car had one windshield wiper on the left side; that he was driving about 30 miles an hour, and when about half a block from the intersection the lights changed to green for north and south; that it was raining and you could not see any distance; that when he was entering 30th street at the south side he could not exactly see any people on the northeast corner; that he never saw any person in front of his car, but never looked at the northeast corner; that when about 12 or 14 feet north of the crossing "I seen something like it somebody threw something from the side"; he stopped his car and found plaintiff lying in the street. A passenger testified that plaintiff was lying 8 or 10 feet north of the north walk of 30th street. The handle on the right door of defendant's car was knocked off and the glass in this door cracked; there was a dent in the right front fender. Defendant and his witnesses say that this dent had been there for some time and was rusty; a police officer testified he saw no rust, but a witness for defendant says that in a conversation with defendant's counsel the officer had admitted that the dent showed rust.

In view of the conflict in the evidence as to which of the parties had the green light and as to whether the plaintiff came in contact with defendant's car on the north crosswalk or a considerable distance to the north, the court would not have been justified in directing a verdict. Willey v. Hopkins, 233 Ill. 614, 616. The guilt or innocence of the defendant was a question of fact to be determined by the jury. The trial judge, who heard and saw the witnesses, approved the verdict and entered judgment. He cannot disturb his action unless the verdict is clearly and manifestly against the weight of the evidence. Head v. Commerce, 324 Ill. App. 607, 609, 610, 611. The determination of the questions

3.

of fact submitted to the jury depended upon whether the testimony of the plaintiff or defendant was accepted by the jury as the more credible. The jury accepted the testimony of the plaintiff and we cannot say that this decision was against the manifest weight of the evidence.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., concurs.
O'Connor, J., took no part.

of fact admitted to the jury depended upon whether the testimony of the plaintiff or defendant was accepted by the jury as the more credible. The jury accepted the testimony of the plaintiff and we cannot say that this decision was against the manifest weight of the evidence. The judgment is affirmed.

AFFIRMED.

McIntosh, J., concurring.
O'Connor, J., took no part.

A

2332

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D. 1946
Gen. No. 10076

ALFRED KREPS, a minor, by
GOLDIE ZAMOWSKI, his mother
and next friend,

Plaintiff-Appellant,

vs

FRANK A. D'AGOSTINE, doing business
as Blackhawk Tavern,

Defendant-Appellee.

Appeal from
Circuit Court,
Winnebago County.

329 I.A. 190'

Bristow, J.

Alfred Kreps, a minor, by his next friend brought suit in the Winnebago County Circuit Court against Frank A. D'Agostine, doing business as the Blackhawk Tavern, for damages under the provisions of the Illinois Dram Shpp Act. Plaintiff's complaint and amended complaint were both stricken upon motion by defendant because they did not state a good cause of action. The plaintiff elected to stand by his pleading, whereupon the trial court entered judgment for defendant and against plaintiff in bar of action and costs. Was the lower court's determination that the plaintiff's complaint was insufficient as a matter of law a correct one? This is the question raised in this appeal.

The amended complaint alleged that on January 26th, 1944, the defendant owned and operated a tavern in Rockford, Illinois, where he sold and gave intoxicating liquors to Leroy Anderson, thereby causing Anderson's intoxication. It also alleged that

IN THE
 APPELLATE COURT OF ILLINOIS
 SECOND DISTRICT
 February Term, A. D. 1948
 Gen. No. 10078

Appel from
 Circuit Court,
 Winnebago County.

ALFRED KREPS, a minor, by
 GOLDIE KREPS, his mother
 and next friend,

Plaintiff-Appellant,

vs

FRANK A. DIAGOSTINI, doing business
 as Blackhawk Tavern,

Defendant-Appellee.

Brister, J.

Alfred Krebs, a minor, by his next friend brought suit in the Winnebago County Circuit Court against Frank A. Diagnostics, doing business as the Blackhawk Tavern, for damages under the provisions of the Illinois Dram Shop Act. Plaintiff's complaint and amended complaint were both withdrawn upon motion by defendant because they did not state a good cause of action. The plaintiff elected to stand by his pleading, whereupon the trial court entered judgment for defendant and against plaintiff in bar of action and costs. Was the lower court's determination that the plaintiff's complaint was insufficient as a matter of law a correct one? This is the question raised in this appeal.

The amended complaint alleged that on January 28th, 1944, the defendant owned and operated a tavern in Rockford, Illinois, where he sold and gave intoxicating liquors to Leroy Anderson, thereby causing Anderson's intoxication. It also alleged that

on said date the plaintiff was in the company of Anderson in the defendant's tavern; and that each of them, namely, plaintiff, Anderson and the defendant, furnished each other in turn, intoxicating liquor. The complaint further alleged that both plaintiff and Anderson became intoxicated; that plaintiff accepted an invitation extended by Anderson to ride in his automobile, and that Anderson while in a state of intoxication drove his automobile into a tree, thus seriously injuring the plaintiff. The complaint also sets forth that the plaintiff was a minor; that the defendant sold and gave intoxicating liquors to Anderson and the plaintiff after they had become intoxicated; and that his conduct in so doing amounted to wilfulness and wantonness. In other words, the defendant is charged with wilfully and maliciously selling the plaintiff and Anderson intoxicating liquor after they were already intoxicated, and the plaintiff, a minor, was so drunk that he was unable to exercise good judgment and decline a ride with one under the influence of liquor.

It is argued by the plaintiff, both in the lower court and here, that since the plaintiff was a minor, and since the defendant was guilty of wanton misconduct in continuing to sell him intoxicating liquor after he had reached a state of intoxication, that the plaintiff is entitled to recover from the defendant under the Dram Shop Act notwithstanding the fact that he contributed to Anderson's state of intoxication. Plaintiff cites no authorities sustaining his view. On the contrary our courts have repeatedly held that one who is injured by an intoxicated person cannot under the Dram Shop Act recover damages from the tavernkeeper who furnished such person with liquor if the injured person invited him to drink or furnished him liquor which contributed to his intoxication. Forsberg vs Around Town Club, Inc., 316 Ill. App. 661; Douglas et al vs Athens Marher Corp. et al, 320 Ill. App. 40; Holmes vs Rolando, 320 Ill. App. 475; Hays vs Waite, 36 Ill. App. 397; Reget vs Bell, 77 Ill. 593; Pearson et al vs Renfro et al., 320 Ill. App. 202; James vs Wicker, et al., 309 Ill. App. 397; Hill vs Alexander, 321 Ill. App. 406; People for use of Lenand vs Linck, et al., 71 Ill. App. 358.

on said date the plaintiff was in the company of Anderson in the
 defendant's tavern; and that each of them, namely, plaintiff, Anderson
 and the defendant, furnished each other in turn, intoxicating liquor.
 The complaint further alleges that both plaintiff and Anderson became
 intoxicated; that plaintiff's subsequent invitation extended by
 Anderson to ride in his automobile, and that Anderson while in a state
 of intoxication drove his automobile into a tree, thus seriously
 injuring the plaintiff. The complaint also sets forth that the
 plaintiff was a minor; that the defendant sold and gave intoxicating
 liquors to Anderson and the plaintiff after they had become intoxi-
 cated; and that his conduct in so doing amounted to willfulness and
 wantonness. In other words, the defendant is charged with willfully
 and maliciously selling the plaintiff and Anderson intoxicating liquor
 after they were already intoxicated, and the plaintiff, a minor, was
 so drunk that he was unable to exercise good judgment and decline a
 ride with or under the influence of liquor.
 It is argued by the plaintiff, both in the lower court and
 here, that since the plaintiff was a minor, and since the defendant
 was guilty of wantonness also in continuing to sell him intoxicating
 liquor after he had reached a state of intoxication, that the plain-
 tiff is entitled to recover from the defendant under the Dram Shop
 Act notwithstanding the fact that he contributed to Anderson's state
 of intoxication. Plaintiff cites no authorities sustaining his
 view. On the contrary our courts have repeatedly held that one who is
 injured by an intoxicated person cannot under the Dram Shop Act re-
 cover damages from the tavernkeeper who furnished such person with
 liquor if the injured person invited him to drink or furnished him
 liquor which contributed to his intoxication. Forrester vs. Brown,
Town Club, Inc., 318 Ill. App. 681; Moulton et al vs. Atkins & Son
Corp. et al, 320 Ill. App. 40; Holmes vs. Rolando, 320 Ill. App. 475;
Hays vs. Hays, 32 Ill. App. 377; Rees vs. Bell, 77 Ill. 683;
Peerson et al vs. Reilly et al., 320 Ill. App. 303; James vs. Moyer,
et al., 320 Ill. App. 307; Hill vs. Alexander, 321 Ill. App. 432;
People for use of Land vs. Lusk, et al., 71 Ill. App. 358.

The complaint under consideration here clearly discloses that the plaintiff was an active and willing agent in bringing about the intoxication of Anderson. If one was guilty of wanton and wilful misconduct, they were all guilty. Wilgeroth vs Maddox, 281 Ill. App. 480. The fact that the plaintiff was a minor places him in no different position than if he were an adult. Pearson vs Renfro, 320 Ill. App. 202.

Plaintiff's counsel in this appeal relies principally upon language used in the case of Hays vs Waite, 36 Ill App. 397. In that case, Waite and Vaughn were drinking together in Hays tavern. A brawl ensued whereupon Waite was stabbed with a knife by Vaughn. Waite had contributed some to the intoxication of Vaughn. The court there, while deciding that Waite was not entitled to recover, used (the) the following language: "We know of no exception in this state to the general rule of law that prohibits a recovery for injuries received by persons where the person injured has in a material and substantial degree contributed to his own injury through his own negligent, wrongful or reckless act except in cases where the direct and immediate cause of the injury was the result of the wilful or malicious act of another." There the court simply recognized the rule of law that contributory negligence is no defense to a charge of wanton and malicious misconduct. Such a statement is no authority for the principle urged here that under the Dram Shop Act the seller of intoxicating liquor who acts wilfully is liable notwithstanding the fact that the injured party contributed to bring about his own injury. At common law there is no remedy for injury following the sale of liquor, wither on the theory that it is a direct wrong or on the ground that it is negligence which imposes a legal liability on the seller for damages resulting from intoxication. Hill vs Alexander, 321 Ill. App. 406. Other cases cited by appellant in his brief have no bearing or throw no light upon the question involved here.

The reviewing courts in this state have seemingly gone to the extreme in holding that there shall be no recovery under the Dram

The complaint under consideration here clearly discloses
 that the plaintiff was an active and willing agent in bringing about
 the intoxication of defendant. If one was guilty of drunkenness and willing
 misconduct, they were all guilty. Wilkens v. M. D. 480.
 The fact that the plaintiff was a minor places him in no different
 position than if he were an adult. Barrett v. Wright, 320 Ill. App. 308.
 Plaintiff's counsel in this appeal relies principally upon
 language used in the case of Hays v. White, 36 Ill. App. 307. In
 that case, White and Hays were drinking together in Hays tavern.
 A brawl ensued whereupon White was stabbed with a knife by Hays.
 White had contributed some to the intoxication of Hays. The court
 there, while deciding that White was not entitled to recover, used the
 following language: "We know of no exception in this state to
 the general rule of law that prohibits a recovery for injuries received
 by persons where the person injured has in a material and substantial
 degree contributed to his own injury through his own negligence, wrong-
 ful or reckless act except in cases where the direct and exclusive
 cause of the injury was the result of the willful or malicious act of
 another." There the court simply recognized the rule of law that
 contributory negligence is no defense to a charge of drunkenness and mis-
 conduct. Such a statement is no authority for the principle
 upon which the defendant here seeks to set aside the verdict of the jury.
 Ignorance as to whether one is liable notwithstanding the fact that the
 injured party contributed to bring about his own injury. As common law
 there is no remedy for injury following the acts of another, whether on
 the theory that it is a direct wrong or on the ground that it is negli-
 gence which imposes a legal liability on the other for the direct result
 of the intoxication. Hill v. Alexander, 781 Ill. App. 406. Other
 cases cited by appellant in his brief have no bearing on the present issue
 and the question involved here.

The reviewing courts in this state have seemingly gone to
 the extent of holding that there shall be no recovery under the dram

Shop Act where the complaining person has been an active and willing agent along with the saloon keeper in causing the intoxication of a person who in turn brings about an injury to the party complaining. To illustrate; In the case of Reget vs Bell, ^{SUPRA} the plaintiff charged the saloon keeper with maliciously and negligently selling her husband intoxicating liquor, causing his death and her loss of his support. The Supreme Court in denying her recovery said that she sat by and did nothing, that it was her duty to break the jug and get rid of the whisky and thus prevent further indulgence on his part. And the Court further stated that "she must be considered as a willing party to his conduct and instrumental in bringing the loss upon herself."

We believe the trial court correctly held that the plaintiff's amended complaint did not state a good cause of action, and that judgment entered herein for the defendant should be affirmed.

JUDGMENT AFFIRMED.

Shop Act where the complaining person has been an active and willing agent along with the saloon keeper in causing the intoxication of a person who in turn brings about an injury to the party complaining. To illustrate: In the case of Beetle vs. Bell,²⁰⁹ the plaintiff charged the saloon keeper with maliciously and negligently selling her husband intoxicating liquor, causing his death and her loss of his support. The Supreme Court in denying her recovery said that she set by and did nothing, that it was her duty to break the jug and get rid of the whisky and thus prevent further indulgence on his part. And the Court further stated that "she must be considered as a willing party to his conduct and involvement in bringing the loss upon herself."

We believe the trial court correctly held that the plaintiff's amended complaint did not state a good cause of action, and that judgment entered therein for the defendant should be affirmed.

JUDGMENT AFFIRMED.

O. K. Jones

329 I.A. 190²

A

Abstract

Gen. No. 10087,

Agenda No. 22.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1946.

7753

L. F. SCHAUMBURG, ARCHIE McCAULEY,
JOHN J. DePOVER, JR., et al.,
Plaintiffs-Appellees,

vs.

ALLEN M. LINDSAY, et al.,
Defendants-Appellants.

Appeal from
Circuit Court,
Rock Island County.

PER CURIAM.

On Jan. 19, 1946, L. F. Schaumburg and others, employees at the J. I. Case Company Plant at Rock Island, Illinois, filed a complaint in the Circuit Court of Rock Island County, for an injunction against Allen M. Lindsay and others, to restrain them from interfering with the plaintiffs in going to and from their work at the J. I. Case Company in Rock Island, Illinois. It is alleged in the complaint that the defendants were on a strike at the Case Plant and were interfering with the rights of the plaintiffs in going to and from their work.

The complaint was verified and supported by affidavits of George Campbell, Tony Lujan, Lloyd Crumly, Paul E. Randles, Robert G. Neville and Elnora Means. At the time of the filing of the

2. 1/2

3221A.130



RECEIVED

U.S. DEPARTMENT OF JUSTICE



IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA
January 10, 1940

Plaintiff
George W. ...
Defendant
Black Island Company

...
...
...

vs.

...
...

THE COURT

On July 12, 1940, in the foregoing and other, employees
at the J. I. Case Company Plant at Rock Island, Illinois, filed a
complaint in the District Court of Rock Island County, for an injunc-
tion against Allen E. Lindsay and others, to restrain them from in-
terfering with the plaintiffs in going to and from their work at the
J. I. Case Company in Rock Island, Illinois. It is alleged in the
complaint that the defendants were on a strike at the Case Plant
and were interfering with the rights of the plaintiffs in going to
and from their work.

The complaint was verified and supported by affidavits of
George Campbell, Tony Lacey, Lloyd Gentry, Sam L. Hardless, Robert
G. Deville and others known to the filer of the

2.

complaint, a motion was made by the plaintiffs' attorney for a temporary injunction. This motion was presented to the presiding judge of the Court, who ordered the issuance of a temporary injunction.

The injunction was served upon the defendants, and on a petition of Allen M. Lindsay and others, a change of venue was granted from the Honorable Ray I. Klingbiel, the presiding judge. Another judge was called to preside at the hearing of the case. On January 23, 1946, the defendants filed their motion to dissolve the temporary injunction, and to strike portions of plaintiff's complaint. The motion is as follows: "Now comes the Defendants by their attorneys Stewart R. Winstein and Meyers & Meyers and moving the court to dissolve the temporary injunction heretofore entered in said cause and to strike individual portions of plaintiff's complaint states unto the Court the following:

"1. That no bond has been given in the application for the temporary injunction and that there is no showing of good cause for plaintiff's failure so to do.

"2. That no notice of hearing has been given of plaintiff's application for temporary injunction and no good cause is shown for plaintiff's failure so to do.

"3. That it is apparent from a reading of plaintiff's complaint that the same is wanting in equity and fails to set forth a cause of action and facts upon which the relief as prayed should be granted.

"4. That plaintiff's complaint consists of conclusions and fails to state with particularity the facts upon which said conclusions are based.

concluded, a motion was made by the plaintiff's attorney for a temporary injunction. This motion was granted to the plaintiff, and the court, who ordered the issuance of a temporary injunction.

The injunction was served upon the defendant, and on a return of the defendant, it was shown that a change of name was granted to the defendant by the court, and that the defendant had been granted from the defendant by the court, the preceding judge. Another judge was called to assist at the hearing of the case. On January 28, 1900, the defendant filed their motion to dissolve the temporary injunction, and to strike portions of plaintiff's complaint. The motion is as follows:

"Now comes the defendant by their attorney Stewart A. Winick and Weyers & Weyers and moving the court to dissolve the temporary injunction heretofore entered in this case and to strike portions of plaintiff's complaint as set forth into the Court as follows:

"1. That no bond has been given in the application for the temporary injunction and that there is no showing of good cause for plaintiff's failure to do so.

"2. That no notice of hearing has been given to plaintiff's application for temporary injunction and no good cause is shown for plaintiff's failure to do so.

"3. That it is apparent from a reading of plaintiff's complaint that the same is void in equity and fails to set forth a cause of action and that upon which the relief is prayed should be granted.

"4. That plaintiff's complaint consists of conclusions and facts which are not supported by the facts upon which this court is called upon to decide.

Wherefore the defendant

3.

"5. That plaintiff's complaint fails to state a cause of action against any of the defendants named therein.

"6. That the relief as prayed is too broad and that no reason is stated showing the necessity of the issuance of the temporary injunction.

"7. That the defendants will be unduly prejudiced by the issuance of plaintiff's injunction.

"8. That paragraphs four, five, and six of defendant's complaint consists of mere conclusions of the pleader and fails to state with particularity the facts upon which said conclusions were based.

"Wherefore, defendants pray that the injunction heretofore entered may be dissolved; that plaintiff's complaint and the individual portions thereof hereinabove mentioned may be stricken, and that upon the dissolution of the injunction heretofore entered damages may be assessed against the plaintiffs, and for such other relief as may be just and equitable in the premises.

Meyers and Meyers
By Ben Meyers
and
Stewart R. Winstein,
Attorneys for Defendants."

The Court, upon hearing the motion of the defendants, to dissolve the injunction, overruled the motion, and from this order the defendants have perfected an appeal to this Court.

It is first insisted by the appellants that the complaint does not state a good cause of action, and on its face, it is apparent

1. That Plaintiff's complaint fails to state a cause of

action against any of the defendants named therein.

2. That the relief sought is too broad and that no

person is shown to be the necessity of the issuance of the

temporary injunction.

3. That the defendant will be greatly prejudiced by the

issuance of Plaintiff's injunction.

4. That Plaintiff's four, five, and six of defendant's

complaints consist of mere conclusions of the plaintiff and fail to

state with particularity the facts upon which said conclusions were

based.

5. That Plaintiff's complaint is so framed as to leave the

defendant in doubt as to the nature of the complaint and to the

defendant's position therein, and that the complaint is so framed

as to make it impossible for the defendant to know the nature of the

complaint and to prepare his defense, and for such other

reasons as may be just and equitable in the premises.

Respectfully submitted,

IV. Ben Rogers

and

Steven M. Weinstein,

Attorneys for Plaintiff.

The Court, upon reading the motion of the defendant, do

dismiss the complaint, with costs, and issue this order.

The defendant's motion is granted as to this Court.

It is thus ordered by the Court that the complaint

be dismissed with costs, and on this day, it is so ordered.

4.

that it lacks equity. We have examined the petition and supporting affidavits and it is our conclusion that it states a good cause of action, and while it may be subject to some criticism, of stating conclusion rather than facts, there are sufficient facts definitely stated, and verified to comply with the Statute in stating a good cause of action.

It is seriously contended by the appellants that the Court erred in granting the injunction without notice to the defendants, and in not requiring the plaintiffs to post a bond, as required by the Statute. This same question was before this Court in the case of Craig vs. Craig, 175 Ill., App. 176, where this Court, speaking through Mr. Justice Willis, used this language: "If it be true that the injunction was issued without notice the objection has been nevertheless waived, since a motion to dissolve operates as a waiver of the irregularity (High on injunctions, Sec. 1615,) in as much as such a motion operates as a demurrer to the bill."

In the case of Utterback vs. Estill, 224 Ill. App., 161, the same question was also before this Court and we there held: "Section 3, ch. 69, of the statute (Cahill's Ill. St. ch. 69, Par. 3) provides that injunctions without notice may be issued, provided it shall appear from the bill or affidavit that the rights of the complainant will be unduly prejudiced if the injunction is not granted immediately and without notice. Appellants, in their original brief, claim that this section was not complied with and for that reason the injunction was void. Appellee calls attention to the cases

5.

of Adams v. Oberndorf, 121 Ill. App. 497, and Williams v. Chicago Exhibition Co., 188 Ill. 19, where it was held that a motion to dissolve was a waiver of a failure to give notice as provided by statute. Appellants, in their reply brief, concede that defect was waived."

In the case of Williams vs. Chicago Exhibition Company, 188 Ill., 19 at page 27, the Supreme Court used this language: "It is strenuously insisted by the defendants in error, that the injunction was dissolved because it was granted without notice to the defendants in the bill. The record does not show, that the injunction was dissolved because no notice was given, before it was granted, that it would be applied for. On the contrary, the final decree or order, entered by the court, recites that a motion was made to dissolve the injunction upon the face of the bill, and that this motion, after argument, was sustained by the court. If, however, there was any irregularity in the original issuance of the injunction, such as failure to give notice, such irregularity was waived by the motion to dissolve upon the face of the bill, inasmuch as such motion operated as a demurrer to the bill. "A motion to dissolve operates as a waiver of the irregularity." (High on Injunctions, sec. 1615.)" To the same effect is O'Kane vs. West End Dry Goods Store, 72 Ill., App. 297; Cook County Brick Company vs. Kaehler, 83 Ill., App. 453; Sprague vs. Monarch Book Company, 105 Ill., App. at Page 535; Adams vs. Oberndorf, 121 Ill., App. Page 503; Grand Opera House Company vs. Herbert Ripley, 166 Ill., App. 170;

of a new system, the 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2

6.

Obeirne vs. City of Elgin, 187 Ill., App. at Page 587; People vs. Continental Beneficial Association, 204 Ill., App. 509 and Lange vs. Massachusetts Mutual Life Insurance Company, 273 Ill., App. 356.

It is our conclusion that the appellants, by entering a motion to dissolve the injunction, have waived any irregularity in regard to notice, and the failure of the Court to require the plaintiffs to give a bond. The order overruling the motion to dissolve the injunction will be affirmed.

Order affirmed.

V. I. Lenin

1. The first of these is the fact that the

100-443887-100

1904 2 1 1904

Abstract

STATE OF ILLINOIS
APPELLATE COURT
May Term, A. D. 1946.

329 I.A. 238

Gen. No. 9483

Agenda No. 2

James Pike,)
Petitioner-Appellant,) Appeal from
-vs-) Circuit Court
Cina Wilcox,) Sangamon County.
Respondent-Appellee.)

Per Curiam:

This is an appeal from an order of the Circuit Court of Sangamon County, which court, on appeal from the Probate Court, and on a trial de novo without a jury, denied the prayer of a petition for the appointment of a conservator for Cina Wilcox, an alleged incompetent, and dismissed said petition.

On September 16, 1944, James Pike, a brother of Cina Wilcox, filed in the Probate Court his petition which alleged that Cina Wilcox was deteriorated mentally by reason of advanced age, and that by reason of such disability she was incapable of managing and caring for her own estate. The petition prayed that a hearing be had and that W. M. Pfeffer be appointed conservator. On September 20, 1944, the Probate Court entered an order adjudging Cina Wilcox an incompetent and appointing W. M. Pfeffer conservator of her person and property. On September 20, 1944, letters of conservatorship were issued to Pfeffer by the Probate Court.

Abstract

STATE OF ILLINOIS
Circuit Court
May Term, A. D. 1918.

323 I.A. 338

Attest: May 2

Now, to wit: 1918

)	James E. Rice,
)	Petitioner-Applicant,
)	vs-
)	The People,
)	Respondent-Appellee.

Indorsed from
Circuit Court
Madison County.

For Petitioner:

This is an appeal from an order of the Circuit Court of Madison County, which court, on appeal from the Probate Court, and on a writ of habeas corpus, denied the petition of a petitioner for the appointment of a conservator for the said Alice, an alleged incompetent, and returned said petition.

On January 18, 1914, James E. Rice, a brother of said Alice,

filed in the Probate Court his petition which alleged that said Alice was incompetent mentally by reason of advanced age,

and that by reason of such incompetency she was incapable of managing and caring for her own estate. The petition prayed

that a hearing be had and that J. W. Patten be appointed conservator. On September 20, 1914, the Probate Court entered

an order sustaining said Alice as incompetent and appointing

J. W. Patten conservator of her person and property. On September

30, 1914, letters of conservatorship were issued to Patten by

the Probate Court.

On September 25, 1944, Thomas R. Maxwell filed in the Probate Court his petition which alleged that he was and had been a resident of Sangamon County and a close friend of Cina Wilcox for many years, that on September 9, 1944, he received a power of attorney from her, that to the best of his knowledge, information and belief she was fully competent mentally to make said power of attorney, and competent to transact ordinary business affairs, that he was informed and believed that his power to act as attorney in fact for her was coupled with an interest and that he felt aggrieved and prejudiced by reason of the order adjudging her incompetent and appointing such conservator of her person and property. The petition asked that the court fix the amount of the bond for an appeal to the Circuit Court from the orders of the Probate Court.

Attached to and made a part of the petition was a copy of such power of attorney. Such power of attorney was dated September 9, 1944, and stated that she thereby appointed Thomas R. Maxwell her attorney to transact all her ordinary bank business at two named banks, to draw checks, to endorse checks, promissory notes, drafts and bills of exchange for collection or deposit, to manage her farms by leasing, collecting the rents and paying all expenses thereof, to sell and convey all personal property which she might have or come into possession of, to waive and demand notice of protest, and to manage and transact all or any other business.

On September 25, 1944, the Probate Court entered an order which order stated that the court allowed the motion of Thomas R. Maxwell, attorney in fact for Cina Wilcox, for leave to appeal to the Circuit Court upon filing a bond in the sum of \$500 within twenty

On September 22, 1922, Thomas A. Maxwell filed in the Probate Court his petition which alleged that he was and had been a resident of Jackson County and a close friend of Clara Alcock for many years, that on September 2, 1922, he received power of attorney from her, that in the past of his knowledge, information and belief she was fully competent mentally to make said power of attorney, and competent to transact ordinary business affairs, that he had informed and believed that his power to act as attorney in 1922 for her was coupled with an interest and that he felt authorized and qualified by reason of the order appointing her guardian and appointing such guardian of her person and property, to petition and to file the same for the amount of the bond for an appeal in the Circuit Court from the order of the Probate Court.

Alcock so and with a copy of the petition and a copy of such power of attorney. Such power of attorney was dated September 2, 1922, and recited that she thereby appointed Thomas A. Maxwell her attorney to transact all her ordinary and business affairs, to execute bonds, to draw checks, to endorse checks, promissory notes, drafts and bills of exchange for collection or deposit, to receive and take by check, collect the rents and pay all expenses thereof, to sell and convey all personal property which she should own or come into possession of, to take and demand monies of herself, and to receive and transmit all of any other business.

On September 22, 1922, the Probate Court entered an order which order stated that the court allowed the action of Thomas A. Maxwell, attorney in fact for Clara Alcock, for leave to appeal to the Circuit Court upon filing a bond in the sum of \$200 within twenty

days. On October 2, 1944, there was filed in and approved by the Probate Court an appeal bond in the sum of \$500, signed by "Cina Wilcox by Thomas R. Maxwell, attorney in fact" and two sureties. The transcript of the record on appeal from the Probate Court to the Circuit Court was filed in the Circuit Court on October 5, 1944.

On December 4, 1944, Pfeffer, as conservator, filed his special appearance in the Circuit Court and moved to dismiss the appeal on the grounds that, (1), Such power of attorney did not authorize or empower Maxwell, as such attorney in fact, to make, execute or deliver the appeal bond in the name of or on behalf of Cina Wilcox, and that, (2), the appeal was granted by the Probate Court to and on the petition of Maxwell and not to Cina Wilcox. On December 4, 1944, the Circuit Court entered an order denying such motion to dismiss the appeal. The Circuit Court thereupon appointed a guardian ad litem for Cina Wilcox and tried the case without a jury. On December 11, 1944, the Circuit Court entered its final order by which it found the issues against the appellant herein and in favor of the appellee, and found that Cina Wilcox was in all respects competent and capable of managing and controlling her property. Such order dismissed the petition for the appointment of a conservator.

The first contention of the appellant is that the Circuit Court erred in not dismissing the appeal to such court, (1), because Cina Wilcox, having been adjudged incompetent in the Probate Court, could not perfect any appeal in person and therefore could not perfect an appeal by an attorney in fact, and, (2), because the power of attorney in question did not authorize her attorney in fact to perfect any appeal.

days. On October 2, 1944, there was filed in and approved by the Probate Court an appeal bond in the sum of \$500, signed by "Giles Wicks by Thomas R. Lawless, attorney in fact" and two sureties. The transcript of the record on appeal from the Probate Court to the Circuit Court was filed in the Circuit Court on October 2, 1944. On December 4, 1944, Pfeiffer, as conservator, filed his appeal and appeared in the Circuit Court and moved to dismiss the appeal on the grounds that: (1), such power of attorney did not authorize or a power lawfully, as such attorney in fact, to take, execute or deliver the appeal bond in the name of or on behalf of Giles Wicks, and that, (2), the appeal was granted by the Probate Court to and on the petition of Lawless and not to Giles Wicks. On December 4, 1944, the Circuit Court entered an order denying such motion to dismiss the appeal. The Circuit Court thereupon appointed a guardian ad litem for Giles Wicks and tried the case without a jury. On December 11, 1944, the Circuit Court entered its final order by which it found the issues against the appellant herein and in favor of the appellee, and found that Giles Wicks was in all respects competent and capable of managing and controlling her property. Such order dismissed the petition for the appointment of a conservator. The first contention of the appellant is that the Circuit Court erred in not dismissing the appeal to such court, (1), because Giles Wicks, having been adjudged incompetent in the Probate Court, could not perfect any appeal in person and therefore could not perfect an appeal by an attorney in fact, and, (2), because the power of attorney in question did not authorize her attorney in fact to perfect any appeal.

In Davison v. Heinrich, 340 Ill. 349, the Probate Court denied admission to probate of an alleged will of a decedent. From such order two minor beneficiaries, by their guardians ad litem, were allowed an appeal to the Circuit Court. A daughter of the decedent filed in the Circuit Court her motion to dismiss such appeal for want of jurisdiction. Such motion was denied. Thereupon, after a hearing on the merits, the Circuit Court entered an order admitting such alleged will to probate, from which order the daughter appealed to the Supreme Court. The Supreme Court said that the Circuit Court erred in denying the motion to dismiss the appeal for want of jurisdiction because the appeal fee from the Probate Court to the Circuit Court had not been paid within the time required by statute, but the Supreme Court then said: "The Circuit Court had jurisdiction of the subject matter of appeals from the county court in cases where wills have been admitted to probate or their probate rejected by the county court. When the guardians ad litem, in the county court after they had prayed and been allowed an appeal to the circuit court, had approved and filed in the county court their appeal bond within the required time and filed the transcript of the proceedings of the county court in the circuit court, the circuit court then had jurisdiction of not only the subject matter of such appeals generally, but had jurisdiction of this particular case to determine whether the appeal had been perfected according to law. * * * After appellant's motion to dismiss had been overruled by the circuit court she did not rest upon her then existing rights, but in open court entered into a stipulation that the case should be tried by the court without a jury, and upon the trial her attorneys appeared, entered into a stipulation, cross-examined witnesses, objected to the testimony of witnesses and

In Davison v. Davison, 220 Ill. 425, the Probate Court denied admission to probate of an alleged will of a decedent. From such order two minor beneficiaries, by their guardians ad litem, were allowed an appeal to the Circuit Court. A division of the decedent filed in the Circuit Court her motion to dismiss such appeal for want of jurisdiction. Such motion was denied. Thereupon, after hearing on the merits, the Circuit Court entered an order of setting such alleged will to probate, from which order the daughter appealed to the Supreme Court. The Supreme Court said that the Circuit Court erred in denying the motion to dismiss the appeal for want of jurisdiction because the appeal was from the Probate Court to the Circuit Court and not from the Circuit Court to the Circuit Court. The Supreme Court then said: "The Circuit Court had jurisdiction of the subject matter of appeal from the county court in cases where wills have been admitted to probate or their probate rejected by the county court. When the guardians ad litem, in the county court after they had prayed and been allowed an appeal to the circuit court, had approved and filed in the county court their appeal bond within the required time and filed the transcript of the proceedings of the county court in the circuit court, the circuit court then had jurisdiction of not only the subject matter of such appeals generally, but had jurisdiction of this particular case to determine whether the appeal had been perfected according to law." After specifying the error in this case, the Supreme Court said the circuit court did not set aside her then existing rights, but in open court entered into a stipulation that the case should be tried by the court without a jury, and upon the trial her attorneys appeared, entered into a stipulation, cross-examined witnesses, objected to the testimony of witnesses and

made motions as to the striking out of a portion of the testimony. By so doing she abandoned her special appearance, appeared generally and subjected herself to the jurisdiction of the court. * * * The court then had jurisdiction of the subject matter generally, jurisdiction of the particular case and jurisdiction of all the parties, and therefore had authority to hear and adjudicate the case. * * *."

In the present case, after the Circuit Court had denied the motion of the appellant to dismiss the appeal, the case was tried on the merits and appellant in person, and through his attorney, contested the case on the merits. It is our opinion that the Circuit Court had jurisdiction of the subject matter and of all the parties, and that the appellant waived the question of jurisdiction by so appearing generally and participating in the hearing on the merits.

Appellant calls attention to Section 48 of the Civil Practice Act (Ch. 110, Par. 172, Rev. Stats. of 1945) which provides that a defendant may file a motion to dismiss an action or suit where the court does not have jurisdiction of the person of the defendant or jurisdiction of the subject matter of the action or suit, and to Supreme Court Rule 21 which provides that where, after denial by the court of a motion under said Section 48 the defendant pleads over, this shall not be deemed a waiver of any error in the decision denying such motion, but that the defendant shall have the right to assign such error on appeal from the final judgment, and the appellant in the present case contends that, by reason of said Section 48 and of said Rule 21, the appellant did not waive the error, if any, of the trial court in denying his motion to dismiss the appeal for

made motions as to the striking out of a portion of the testimony. By so doing the appellant has special grounds, especially generally and subjected herself to the jurisdiction of the court. * * * The court then had jurisdiction of the subject matter generally, jurisdiction of the particular case and jurisdiction of all the parties, and therefore had authority to hear and adjudicate the case. * * *

In the present case, after the Circuit Court had denied the motion of the appellant to dismiss the appeal, the case was tried on the merits and appellant is person, and through his attorney, contested the case on the merits. It is our opinion that the Circuit Court had jurisdiction of the subject matter and of all the parties, and that the appellant waived the question of jurisdiction by so appearing generally and participating in the hearing on the merits.

Appellant calls attention to Section 48 of the Civil Practice Act (Ch. 110, Par. 179, Rev. Stat. of 1907) which provides that a defendant may file a motion to dismiss an action on any other ground than lack of jurisdiction of the person of the defendant or jurisdiction of the subject matter of the action or suit, and to Supreme Court Rule 21 which provides that where, after denial by the court of a motion under said Section 48 the defendant pleads over, this shall not be deemed a waiver of any error in the decision denying such motion, but that the defendant shall have the right to assign such error on appeal from the final judgment, and the appellant in the present case contends that, by reason of said Section 48 and of said Rule 21, the appellant did not waive the error, in any of the trial court in denying his motion to dismiss the appeal for

want of jurisdiction. We consider it sufficient to say that it is our opinion that said Section 48 and said Rule 21 do not apply to the appellant herein, who is not a defendant.

The next contention of the appellant is that the judgment of the trial court should be reversed as being against the manifest weight of the evidence.

At the time of the trial Mrs. Wilcox was aged 75 to 78 years. Her husband died in 1932. Her nearest relatives were one brother, who is the appellant, and three sisters.

Since about February, 1942, she has been in poor health, having heart trouble, sclerosis of the arteries and kidney complications. Continuously since about August 28, 1944, she has been a patient in a hospital at Springfield, Illinois.

Her husband was a farmer and devised to her his farm of 245 acres located near New Berlin, Illinois. After his death she continued to live on the farm until taken to the hospital, and during all of such time, except for about four weeks in 1942, she lived alone.

Pfeffer, who was appointed conservator by the Probate Court, was a director and cashier of a bank at New Berlin, and had been connected with such bank for 41 years.

About a month before his death, Mr. and Mrs. Wilcox called at the bank and Mr. Wilcox then asked Pfeffer to look after the business affairs of himself and Mrs. Wilcox, which Pfeffer agreed to do. After the death of Mr. Wilcox, Pfeffer, at the request of Mrs. Wilcox, arranged for the funeral and burial of Mr. Wilcox and in so doing loaned Mrs. Wilcox \$1,000. Thereafter Pfeffer, on the petition of Mrs. Wilcox, was appointed and acted as administrator with the will annexed of the estate of Mr. Wilcox.

On January 9, 1932, Mrs. Wilcox gave Pfeffer a power of attorney by which she empowered him to transact all of her business affairs.

want of jurisdiction. We consider it sufficient to say that it is
our opinion that said Section 88 and said Rule 11 do not apply to
the appellant herein, who is not a defendant.

The next contention of the appellant is that the judgment of
the trial court should be reversed on being awarded the appellant
value of the evidence.

At the time of the trial Mrs. Wilson was aged 75 to 76 years.
Her husband died in 1904. Her nearest relatives were her husband,
she is the appellant, and three sisters.

Since about January, 1912, she has been the poor inmate of the
State Hospital, a chronic of the evidence and highly and illiterate.
Continuously since about August 20, 1904, she has been a patient
in a hospital at Springfield, Illinois.

Her husband was a farmer and resided at his farm of 100 acres
located near New Berlin, Illinois. After the death of the husband he
lived on the farm until taken to the hospital, and during all of those
times, except for about four years in 1904, she lived alone.

Pratt, who was assistant commissioner of the Probate Court, was
a director and co-owner of a bank at New Berlin, and had been
connected with such bank for 15 years.

About a month before his death, Mr. and Mrs. Wilson called at
the bank and Mr. Wilson then asked Pratt to look after the business
affairs of himself and Mrs. Wilson, which Pratt agreed to do.
After the death of Mr. Wilson, Pratt, at the request of Mrs. Wilson,
arranged for the funeral and burial of Mr. Wilson and in so doing
incurred Mrs. Wilson \$1,000. Margaret Pratt, on the petition
of Mrs. Wilson, was appointed and acted as administrator with the
will annexed of the estate of Mr. Wilson.

On January 1, 1920, Mrs. Wilson gave Pratt a power of attorney
by which she authorized him to transact all of her business affairs.

Pfeffer undertook to do so and continued to act in that capacity until appointed conservator by the Probate Court. In so doing Pfeffer rented such farm and collected the rents.

When Pfeffer took charge of Mrs. Wilcox' business affairs on January 9, 1932, there was a bank balance to her credit of \$6.59, and a mortgage of \$3,000 against the farm. In 1936 she sold Pfeffer 40 acres of the farm for \$3400. The proceeds were used by Pfeffer in paying off the mortgage and to apply on the loan of \$1,000 borrowed by Mrs. Wilcox to pay such funeral and burial expenses. At the time of the trial Pfeffer's accounts showed \$5183.09 to the credit of Mrs. Wilcox. Pfeffer made annual typewritten accounts of his business dealings to Mrs. Wilcox, the last being for the year 1943.

Maxwell, who, as such attorney in fact for Mrs. Wilcox, took such appeal from the Probate Court to the Circuit Court, was a physician aged 60 years at the time of the trial. He testified that he was about a third cousin of Mr. Wilcox, and lived two miles from the Wilcox farm. Mrs. Wilcox had never been in his home, and he had had no "close, intimate relationship with her" prior to February 3, 1944, when he found she had heart trouble and kidney complications. Thereafter he treated her professionally every day for a time and later once a week until he caused her to be taken to the hospital, where he caused a Doctor Fleischli to attend her for a time. Maxwell never made any charge to her for his services. Thereafter other doctors, apparently employed by Pfeffer, attended her in the hospital. After she entered the hospital, Maxwell said he saw her almost every day not professionally, but as a friend.

Pfeffer undertook to do so and continued to do so in that capacity until appointed conservator by the Probate Court. In doing Pfeffer rented such farm and collected the rents.

Then Pfeffer took charge of Mrs. Wilcox's business affairs on January 1, 1923, there was a bank balance to her credit of \$6.50, and a balance of \$5,000 against the farm. In 1923 she sold Pfeffer 40 acres of the farm for \$400. The proceeds were used by Pfeffer in paying off the mortgage and to apply on the loan of \$1,000 borrowed by Mrs. Wilcox to pay such funeral and burial expenses. At the time of the trial Pfeffer's accounts showed \$182.00 to the credit of Mrs. Wilcox. Pfeffer made a handwritten account of his business dealings to Mrs. Wilcox, the last being for the year 1943.

Maxwell, who, as such attorney in fact for Mrs. Wilcox, took such account from the Probate Court to the Circuit Court, was a physician aged 50 years at the time of the trial. He testified that he was about a third cousin of Mr. Wilcox, and lived two miles from the Wilcox farm. Mrs. Wilcox had never been in his home, and he had had no "close, intimate relationship with her" prior to February 7, 1944, when he found she had heart trouble and kidney complications. Thereafter he treated her professionally every day for a time and later once a week until he caused her to be taken to the hospital, where he called a Doctor Wlachinski to attend her for a time. Maxwell never made any charge to her for his services. Thereafter other doctors, apparently employed by Pfeffer, attended her in the hospital. After she entered the hospital, Maxwell said he saw her almost every day not professionally, but as a friend.

On September 9, 1944, Mrs. Wilcox, while in the hospital, executed four instruments which we will refer to as a written request to Maxwell, a power of attorney, and two deeds. The written request stated that having reached the advanced age where she felt she wanted some one in whom she had confidence to assist her in all business transactions while she lived, she therefore asked Maxwell to act as her advisor and accept a power of attorney to do and perform all necessary acts in and about her business affairs, and that for Maxwell's services and \$2.00 in cash she agreed to deed him 100 acres of said farm land, subject to a life estate in herself, and the remaining 105 acres of such farm land, subject to a first life estate in herself and thereafter to a life estate in one of her sisters. The power of attorney was the power of attorney by which Maxwell took the appeal from the Probate Court to the Circuit Court. The other two instruments were Warranty Deeds conveying to Maxwell such 205 acres of land subject to such life estates. Such two deeds were recorded at the direction of Maxwell on September 11, 1944. The land thereby conveyed was valued at from \$75.00 to \$150.00 per acre.

As to the facts leading up to and connected with the execution of such instruments, Maxwell testified that in May, 1944, Mrs. Wilcox "presented to him a business proposition," and showed him her farm account with Pfeffer, and said she thought Pfeffer had been taking advantage of her, and he told her she would have to take the account to some one who knew more about it than he; that in June, 1944, she wanted to know if he would take care of "a deal" for her, and he said, "No, if you want me to do anything for you give me some authority"; that in June, 1944, she told him she wanted the income from her farm as long as she lived, and that when she

On November 11, 1941, the Court, while in the majority,
 rendered the following opinion which was a written
 opinion for himself, a power of attorney, and two others. The
 opinion rendered at that time having reached the intended and
 the fact the mental state of the testator was such
 that in all business transactions with the living, the testator
 asked himself to act as his own attorney and agent of attorney
 to do and perform all necessary acts in and about his business
 affairs, and that for himself's services was paid in cash and
 agreed to draw his two shares of all cash and property in
 life estate in himself, and the remainder for wife of him and
 him, subject to a first life estate in himself and his wife,
 so a life estate in one of her shares. The power of attorney
 was the power of attorney by which himself took the cash from
 the Federal Court to the United States. The other two instruments
 were merely deeds conveying to himself each one share of land
 subject to such life estates. With the deeds were returned to
 the Division of Records in December 11, 1941. The land thereby
 conveyed was valued at \$100,000.00 in 1941, no more.
 In the State of Texas he was connected with the execution
 of such instruments, which resulted from the will, and the
 agreement to him a business transaction, and showed him that
 economic state of affairs, and with the financial picture and
 advantages of law, and he told her she would have to take the
 advantage to him and she was sure that it was his; that in 1941,
 1942, she failed to know it he would like the rate of "a" for her,
 and he said, "No, if you want to do as well as you can
 in your business"; that in 1941, 1942, she told him she wanted
 the money from her own account on the 11th, and that when she

died she wanted him "to have that piece of land and nobody else"; that she wanted her sister to have the income from the place where she lived as long as the sister lived, and that she then wanted him to have the rest, and said to him, "Will you stand by me and help me," and that he told her he would do anything in the world that he could; that again on August 19, 1944, she told him she was not satisfied with Pfeffer's dealings and said she wanted her business affairs fixed up; that he suggested she see Charlie Fulton, and she asked him to see Fulton, which he did. Fulton was a close friend of Maxwell, and Maxwell and Fulton had gone fishing together in Canada in May or June of 1944. Maxwell further testified that a few days later she told him that Fulton had seen her and told her "that it was all right"; that he, Maxwell, then said to her, "If you want to do it, when do you want to do it, tomorrow?" and she said to wait until she got a little stronger; that on the morning of September 9, 1944, she told him she wanted her business affairs fixed up that day, and he told her she would have to get a lawyer, and she said she did not know any lawyer but did know a Mr. Zude who formerly worked in the New Berlin bank, and that she would like to have Zude and Mr. Fulton see her; that about 10:30 A. M. of that day he called at the office of a Springfield lawyer and told him what to put in these instruments, and then went from Springfield to New Berlin to get Fulton and Zude; that Fulton was out of town so he then got Zude and a Mr. Marr (who was a son-in-law of Fulton) and took them to such lawyer's office.

The Springfield lawyer prepared such four instruments that forenoon and then went with Zude and Marr to the hospital room of Mrs. Wilcox where the instruments were then executed. Maxwell was

not present when Mrs. Wilcox executed the same, but was in the hospital, and immediately after she so executed the same he was called into her room where he signed his acceptance to such written request by her, and took the instruments and handed the deeds to Zude to be recorded.

Nine lay witnesses for appellant expressed the opinion that Mrs. Wilcox was not mentally capable of transacting ordinary business, while ten lay witnesses for the appellee expressed the opinion that she was capable. One of appellee's witnesses, a minister, who visited Mrs. Wilcox about once every week after she entered the hospital, testified that in his opinion she was incapable of "taking care of anything complicated at all, she would be influenced," that she could take care of simple matters, but was unable "to follow anything complicated through," and that "she is certainly in her senility."

Four doctors, as witnesses for the appellant, expressed the opinion that Mrs. Wilcox was not mentally capable of transacting ordinary business. One of such doctors knew her for about fifteen years and treated her in December, 1943, and saw her once in the hospital; another of such doctors saw and talked with her about seven times in the hospital; another of such doctors attended her about ten times in the hospital; and the other doctor treated her continuously since September 20, 1944.

Doctor Maxwell and two other doctors, as witnesses for the appellee, expressed the opinion that Mrs. Wilcox was capable of transacting ordinary business. Such two other doctors saw Mrs. Wilcox on December 3, 1944, which was the day before the trial in the Circuit Court, at which time, in the presence of Maxwell and the Springfield attorney, they made a mental examination of her

for about fifty minutes. One of them saw and talked with her on other one occasion. Dr. Fleischli who attended her in the hospital for a time at the request of Doctor Maxwell did not testify.

As heretofore stated, Mrs. Wilcox did not personally sign the petition filed in the Probate Court asking that such court fix the amount of the appeal bond, and she did not personally sign the appeal bond. Although she was the respondent and was able to talk with persons in the hospital, she did not testify, and the record shows no attempt to produce her testimony by way of deposition or otherwise.

In view of the foregoing we have carefully read the evidence, not only as abstracted but also as contained in the report of the trial proceedings, and it is our opinion that the judgment of the trial court was against the manifest weight of the evidence and that the ends of justice will be best subserved by having a new trial.

Inasmuch as there must be a new trial, we do not consider it necessary or proper for us to further discuss or comment on such evidence.

Therefore the judgment of the Circuit Court is reversed and the cause is remanded to such court for a new trial.

Reversed and remanded with directions.

For about fifty years, the old law has been in force. It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time.

It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time.

It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time.

It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time. It is a law which has been in force for a long time, and it is a law which has been in force for a long time.

It is a law which has been in force for a long time, and it is a law which has been in force for a long time.

43527) Consolidated
43687)

ROSALIE COWEN,
Appellee,

v.

HARDING HOTEL COMPANY, a Cor-
poration and HARDING HOTEL
MANAGEMENT CORPORATION, a
Corporation,
Defendants.

HARDING HOTEL MANAGEMENT CORPOR-
ATION, a Corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

394
329 I.A. 239'

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 7, 1944, plaintiff brought an action against defendants to recover damages alleging that "defendants, or either of them" owned, controlled and operated a certain restaurant located at 21 South Wabash avenue, Chicago, and in the first count warranted the food served to its patrons to be healthful and wholesome. And in the second count, that it was the duty of defendants or either of them to exercise due care to see that all food which was served patrons of the restaurant was healthful and fit for human consumption. That the defendants or either of them violated their duty in this respect and sold to plaintiff, one of its patrons, a tuna fish salad sandwich which plaintiff ate; that the sandwich contained pieces of tin which plaintiff chewed and swallowed, thereby suffering lacerations of the tissues of the mouth and other injuries and causing her (a married woman and pregnant) to miscarry. Damages were laid at \$25,000.

At the time of the filing of the complaint, July 7, plaintiff filed a written demand for a jury trial. Summons was issued against both defendants. The sheriff's return

43887 Consolidated
43887

ROSALIE COWEN,
Appellee,

v.

HARDING HOTEL COMPANY, a Cor-
poration and HARDING HOTEL
MANAGEMENT CORPORATION, a
Corporation,
Defendants.

HARDING HOTEL MANAGEMENT CORPOR-
ATION, a Corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3281A.338

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 7, 1944, plaintiff brought an action against

defendants to recover damages alleging that "defendants, or

either of them" owned, controlled and operated a certain

restaurant located at 21 South Wabash Avenue, Chicago, and in the

first count warranted the food served to its patrons to be

healthful and wholesome. And in the second count, that it was

the duty of defendants or either of them to exercise due care

to see that all food which was served patrons of the restaurant

was healthful and fit for human consumption. That the defen-

dants or either of them violated their duty in this respect

and sold to plaintiff, one of its patrons, a tuna fish salad

sandwich which plaintiff ate; that the sandwich contained

pieces of tin which plaintiff chewed and swallowed, thereby

entering lacerations of the tissues of the mouth and other

injuries and causing her (a married woman and pregnant) to

miscarry. Damages were laid at \$25,000.

At the time of the filing of the complaint, July 7,

plaintiff filed a written demand for a jury trial. Summons

was issued against both defendants. The sheriff's return

2.

states that he served the hotel company by leaving a copy of the summons with A. J. Sinkula, its office manager and agent of the hotel company, July 7, 1944. There is a further return that the sheriff served the summons on the management corporation by leaving a copy of it with A. J. Sinkula, an agent of that corporation, on the 6th day of July, 1944. August 1, 1944, the hotel company, by its attorney, entered its appearance and on August 7th filed its answer in which it admitted the allegations of paragraph one of count one of the complaint which alleged that "defendants, or either of them" were engaged in operating a restaurant. It admitted that "defendants, or either of them" promised and warranted that the food furnished defendant's patrons would be healthful and wholesome. It denied the allegations of paragraph three of the complaint which charged the food was unwholesome, etc., and denied that anything was wrong with the food or that plaintiff became ill.

December 20, 1944, counsel for the hotel company filed its notice which it had served on counsel for plaintiff that it would ask for an order to take plaintiff's deposition before a notary public and on the same day an order was entered that plaintiff appear before a notary public and submit to oral examination at a certain time and place. April 4, 1945 an order defaulting the management corporation was entered.

April 6, 1945, an order was entered by Judge Klarkowski, assignment judge, to assign the cause to Judge Page, and on the same day an order was entered on motion of counsel for plaintiff whereby it was ordered that plaintiff waived a jury as to the defendant management corporation and that the matter be heard in open court without a jury as against that defendant which had theretofore been defaulted. This was signed by Judge Page. Immediately following and on the same page of the record,

states that he served the hotel company by leaving a copy of the summons with A. J. Sinkula, its office manager and agent of the hotel company, July 7, 1944. There is a further return that the sheriff served the summons on the management corporation by leaving a copy of it with A. J. Sinkula, an agent of that corporation, on the 6th day of July, 1944. August 1, 1944, the hotel company, by its attorney, entered its appearance and on August 7th filed its answer in which it admitted the allegations of paragraph one of count one of the complaint which alleged that "defendants, or either of them" were engaged in operating a restaurant. It admitted that "defendants, or either of them" promised and warranted that the food furnished defendant's patrons would be healthful and wholesome. It denied the allegations of paragraph three of the complaint which charged the food was unwholesome, etc., and denied that anything was wrong with the food or that plaintiff became ill.

December 20, 1944, counsel for the hotel company filed its notice which it had served on counsel for plaintiff that it would ask for an order to take plaintiff's deposition before a notary public and on the same day an order was entered that plaintiff appear before a notary public and submit to oral examination at a certain time and place. April 4, 1945, an order delisting the management corporation was entered. April 6, 1945, an order was entered by Judge Klarowski, reassignment judge, to assign the cause to Judge Page, and on the same day an order was entered on motion of counsel for plaintiff whereby it was ordered that plaintiff waive a jury as to the defendant management corporation and that the matter be heard in open court without a jury as against that defendant which had theretofore been delisted. This was signed by Judge Page. Immediately following and on the same page of the record.

3.

it is recited that plaintiff appeared by attorney "and there-
upon reference is made to the court to assess the plaintiff
damages *** and it appearing to the court, from the plaintiff's
verified complaint *** that there is due and owing to the
plaintiff from the defendant *** \$7,500." On motion of plaintiff's
attorney it is ordered that judgment be entered in favor of
plaintiff and against the management company for \$7,500.
The order continued that it was further considered by the court
that plaintiff have and recover from the management company
\$7,500, together with costs and have execution therefor.

May 23, 1945, execution was issued which was returned
June 23, 1945, by the sheriff that he was unable to find defen-
dant or any of its property with which to satisfy the writ
and it was returned no part satisfied. June 27, 1945, counsel
for plaintiff filed three affidavits naming the Continental
Illinois National Bank & Trust Company of Chicago, the Harding
Hotel Company, a corporation, and Chicago Allerton Hotel Co.,
a corporation, as garnishees, and on the same day filed
interrogatories to each of the garnishees. Garnishee summons
was issued on the same day served on the three garnishees
June 28, 1945. June 30, 1945, the management company filed
its appearance and on July 2, moved the court to set aside the
default to recall and quash the garnishee summons and to grant
the management company leave to file an answer and in support
of this filed the affidavit of A. J. Sinkula in which he swears
that the defendant management company is a wholly owned subsi-
diary of the hotel company, the other defendant; that the
officers and managing agents of the two companies are the same
persons, and that both occupy the same office at 21 South Wabash
avenue, Chicago. That the hotel company is the parent company
and carries public liability insurance with the Liberty Mutual
Insurance Company to protect itself against liability arising

it is recited that plaintiff appeared by attorney "and there-
upon reference is made to the court to assess the plaintiff
damages *** and it appearing to the court, from the plaintiff's
verified complaint *** that there is due and owing to the
plaintiff from the defendant *** \$7,500." On motion of plaintiff's
attorney it is ordered that judgment be entered in favor of
plaintiff and against the management company for \$7,500.
The order continued that it was further considered by the court
that plaintiff have and recover from the management company
\$7,500, together with costs and have execution therefor.
May 23, 1945, execution was issued which was returned
June 23, 1945, by the sheriff that he was unable to find defen-
dant or any of its property with which to satisfy the writ
and it was returned no part satisfied. June 27, 1945, counsel
for plaintiff filed three affidavits naming the Continental
Illinois National Bank & Trust Company of Chicago, the Harding
Hotel Company, a corporation, and Chicago Alorton Hotel Co.,
a corporation, as garnishees, and on the same day filed
interrogatories to each of the garnishees. Garnishee summons
was issued on the same day served on the three garnishees
June 23, 1945. June 30, 1945, the management company filed
its appearance and on July 3, moved the court to set aside the
definit to recall and quash the garnishee summons and to grant
the management company leave to file an answer and in support
of this filed the affidavit of A. J. Sinkula in which he swears
that the defendant management company is a wholly owned sub-
sidiary of the hotel company, the other defendant; that the
officers and managing agents of the two companies are the same
persons, and that both occupy the same office at 21 South Wabash
avenue, Chicago. That the hotel company is the parent company
and carries public liability insurance with the Liberty Mutual
Insurance Company to protect itself against liability arising

4.

from claims such as made by the plaintiff; that the defendants, upon being served with the summons forwarded them to the insurance company by Adolph J. Sinkula, an employee of both companies, who was under the erroneous impression that the insurance covered both companies. That the insurance company, upon receiving the summons which were forwarded to it on July 13, 1944, wrote a letter to the hotel company acknowledging receipt of the summons in the case entitled "Rosalie Cowen v. Harding Hotel Co. a corp. and Harding Hotel Management Corp. a corp.," advising that it would be unnecessary for the hotel company to take any further action; that the insurance company would take any action which was necessary to protect the hotel's interest. On the same day, July 2, 1945, the matter came on for hearing before Judge Fisher and an order was entered denying the motion of the management company. On July 5, the management company filed its notice of appeal, and on July 27, 1945, this court entered an order making the notice of appeal a supersedeas. The record was prepared and filed in this court July 25, 1945. October 15, 1945, the management company filed its abstract of record and briefs. A short time afterwards, November 5, 1945, an order was entered in the Circuit court on motion of attorneys for plaintiff, giving plaintiff leave to file her petition to amend the record and the sheriff's return and the matter was set for hearing on November 15, 1945. On that day there appears in the record plaintiff's petition verified by one of her counsel in which it was averred that there was a mistake in the record due to the misprision of the clerk of the court and the sheriff; that on April 6, 1945, the case was assigned to Judge Page, at which time plaintiff waived a jury as to the management company when submitting her cause to the court as to that defendant, without a jury; that at that time plaintiff testified, as did her physician, as to her claimed injuries, that the court

from claims such as made by the plaintiff; that the defendants,

upon being served with the summons forwarded them to the insurance company by Adolph J. Stinkul, an employee of both companies, who was under the erroneous impression that the insurance covered both companies. That the insurance company, upon receiving the summons which were forwarded to it on July

12, 1944, wrote a letter to the hotel company acknowledging receipt of the summons in the case entitled "Rosalia Cowan v.

Harding Hotel Co., a corp., and Harding Hotel Management Corp.

a corp.," advising that it would be unnecessary for the hotel company to take any further action; that the insurance company

would take any action which was necessary to protect the

hotel's interest. On the same day, July 2, 1945, the matter

came on for hearing before Judge Fisher and an order was

entered denying the motion of the management company. On July

5, the management company filed its notice of appeal, and on

July 27, 1945, this court entered an order making the notice

of appeal a supersedeas. The record was prepared and filed in

this court July 25, 1945. October 15, 1945, the management

company filed its abstract of record and briefs. A short time

afterwards, November 5, 1945, an order was entered in the

circuit court on motion of attorneys for plaintiff, giving

plaintiff leave to file her petition to amend the record and

the sheriff's return and the matter was set for hearing on

November 16, 1945. On that day there appears in the record

plaintiff's petition verified by one of her counsel in which

it was averred that there was a mistake in the record due to

the misapprehension of the clerk of the court and the sheriff;

that on April 6, 1945, the case was assigned to Judge Pate, at

which time plaintiff waived a jury as to the management

company when submitting her cause to the court as to that

defendant, without a jury; that at that time plaintiff testified,

as did her physician, as to her claimed injuries, that the court

5.

after considering all this testimony, found the issues in favor of plaintiff and assessed her damages at \$7,500 and that judgment was entered thereon. The petition then sets up the order of court entered April 6, 1945, to which we have above referred. That the summons was served by the sheriff on both defendants on July 7, 1944 and not on the management company as the sheriff's return showed, on July 6, 1944, for the reason that the sheriff did not receive the summons until July 7, the day the suit was started. The prayer was that the judgment order of April 6, 1945 and the return of the sheriff on the management company be corrected in accordance with the allegations of the petition.

On the same day November 15, 1945, the management company filed objections to plaintiff's motion to amend the judgment and the sheriff's return, setting up that Judge Page had no jurisdiction of the cause and no power to permit the filing of the petition or to enter any orders because the case had not been properly assigned to him in accordance with the rules of the Circuit court of Cook county; that there was no power to amend more than 30 days after the entry of the judgment or the return of the sheriff of the summons and that the cause was then pending in the Appellate court. That the management company had a complete and meritorious defense and the judgment was therefore inequitable and unconscionable and the plaintiff was guilty of laches.

December 27, the management company filed its verified answer to the plaintiff's petition setting up a number of claimed deficiencies and moved that it be dismissed. On the same day an order was entered allowing plaintiff to file her petition to amend the sheriff's return and the judgment order; the amendments were allowed and the management company's motion to strike plaintiff's petition was denied. A further order was entered allowing defendant to file its answer to plaintiff's

after considering all this testimony, found the issues in favor of plaintiff and assessed her damages at \$7,500 and that judgment was entered thereon. The petition then sets up the order of court entered April 6, 1945, to which we have above referred. That the summons was served by the sheriff on both defendants on July 7, 1944 and not on the management company as the sheriff's return showed, on July 6, 1944, for the reason that the sheriff had not received the summons until July 7, the day the suit was started. The prayer was that the judgment order of April 6, 1945 and the return of the sheriff on the management company be corrected in accordance with the allegations of the petition.

On the same day November 16, 1945, the management company filed objections to plaintiff's motion to amend the judgment and the sheriff's return, setting up that Judge Page had no jurisdiction of the cause and no power to permit the filing of the petition or to enter any orders because the case had not been properly assigned to him in accordance with the rules of the Circuit court of Cook county; that there was no power to amend more than 30 days after the entry of the judgment or the return of the sheriff of the summons and that the cause was then pending in the Appellate court. That the management company had a complete and meritorious defense and the judgment was therefore indefeasible and unconnectionable and the plaintiff was guilty of laches.

December 27, the management company filed its verified answer to the plaintiff's petition setting up a number of claimed defenses and moved that it be dismissed. On the same day an order was entered allowing plaintiff to file her petition to amend the sheriff's return and the judgment order. The amendments were allowed and the management company's motion to strike plaintiff's petition was denied. A further order was entered allowing defendant to file its answer to plaintiff's

6.

petition to amend. Thereupon a verified answer was filed, in which it was alleged among other things, that the management company was engaged solely and exclusively in the management of the Allerton Hotel, located at 701 North Michigan avenue, Chicago, and that the management company had never at any time had any ownership or control or any connection with the restaurant at 21 South Wabash avenue, where plaintiff claims she purchased the food. And in the report of proceedings of the trial both counsel agree that plaintiff denied every allegation and conclusion of the answer. January 2, 1946, the management company filed its notice of appeal.

Counsel for the management company say that the sheriff's return, purporting to show service on it "was a complete nullity, and the trial Court had no jurisdiction to endow it with retroactive validity by amendment," while counsel for plaintiff contend that the return was authorized by the statute of Amendments and Joefails, (ch. 7, Ill. Rev. Stats., 1945) and particularly rely on secs. 2, 4 and 6 of that act. Section 2 provides that: "After judgment rendered in any cause any defects or imperfections in matter of form, contained in the record, pleadings, process, entries, returns or other proceedings ***, may be rectified and amended by the court in affirmance of the judgment, so that such judgment shall not be reversed or annulled." Section 4: "All returns by any sheriff or other officer, or by any court or subordinate tribunal, to any court, may be amended in matter of form, or according to the truth of the matter, by the court to which such returns shall be made, in its discretion, as well before as after judgment." And section 6: "Judgment shall not be arrested or stayed after verdict, nor shall any judgment upon verdict or finding by the court, *** or upon any writ of inquiry of damages be reversed, impaired, or in any affected,

petition to amend. "Not upon a verified answer was filed,

in which it was alleged among other things, that the

management company was engaged solely and exclusively in the

management of the Alston Hotel, located at 701 North Michigan

avenue, Chicago, and that the management company had never at

any time had any ownership or control or any connection with

the restaurant at 31 South Wabash avenue, where plaintiff claims

and purchased the food. And in the report of proceedings of

the trial both counsel agree that plaintiff denied every allega-

tion and conclusion of the answer. January 2, 1946, the

management company filed its notice of appeal.

Counsel for the management company say that the sheriff's

return, purporting to show service on it "was a complete

nullity, and the trial Court had no jurisdiction to enter its

with retrospective validity by amendment," while counsel for

plaintiff contend that the return was authorized by the statute

of Amendments and Joinders, (Ch. 7, Ill. Rev. Stats., 1945)

and particularly rely on secs. 2, 4 and 6 of that act. Section

2 provides that: "After judgment rendered in any cause any

defects or imperfections in matter of form, contained in the

record, pleadings, process, entries, returns or other pro-

ceedings *** may be rectified and amended by the court in

affirmance of the judgment, so that such judgment shall not

be reversed or annulled." Section 4: "All returns by any

sheriff or other officer, or by any court or subordinate

tribunal, to any court, may be amended in matter of form, or

according to the truth of the matter, by the court to which

such returns shall be made, in its discretion, as well before

as after judgment." And section 6: "Judgment shall not be

arrested or stayed after verdict, nor shall any judgment upon

verdict or finding by the court, *** or upon any writ of

inquiry of damages be reversed, impaired, or in any affected,

7.

by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records ***. Third- For any imperfect or insufficient return by any sheriff or other officer."

Counsel for defendant contend that the statute just quoted from allows amendments for "defects or imperfections in matter of form," and that the amendment of the return was not a matter of form but of substance and further that the trial court abused its discretion in amending the sheriff's return and that judgment in refusing to consider the equities and justice of the matter involved.

We think the court had jurisdiction to allow the amendments to the sheriff's return and to the judgment although more than 30 days had elapsed after the entry of the judgment, but we think the court abused its discretion in not considering all that had been done in the case. It appears from the verified pleadings of the defendants, the hotel company and the management company, that the restaurant at 21 South Wabash avenue, where plaintiff claimed she purchased the unwholesome food which caused her to be ill, was owned, operated and controlled solely by the hotel company and that the management company had no connection with the conduct of that restaurant but was engaged in managing the Allerton Hotel, located at 701 North Michigan avenue, about a mile distant from the restaurant. Moreover, the officers of both defendants were alleged to be the same persons; the summons was sent by the hotel company to the liability insurance company and counsel for the insurance company in acknowledging receipt of the summons made no reference to the fact that the insurance company did not cover the management company.

A further reason why we think the court abused its discretion is that when plaintiff brought her suit she filed a written demand for a jury trial. The hotel company filed

by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records ***. Third- For any imperfect or insufficient return by any sheriff or other officer."

Counsel for defendant contended that the statute just quoted from allows amendments for "defects or imperfections in matter of form," and that the amendment of the return was not a matter of form but of substance and further that the trial court abused its discretion in amending the sheriff's return and that judgment in refusing to consider the equities and justice of the matter involved.

We think the court had jurisdiction to allow the amendments to the sheriff's return and to the judgment although more than 30 days had elapsed after the entry of the judgment, but we think the court abused its discretion in not considering all that had been done in the case. It appears from the

verified pleadings of the defendants, the hotel company and the management company, that the restaurant at 21 South Wabash avenue, where plaintiff claimed and purchased the unfortunate food which caused her to be ill, was owned, operated and controlled solely by the hotel company and that the management company had no connection with the conduct of that restaurant but was engaged in managing the Alton Hotel, located at 701 North Michigan avenue, about a mile distant from the restaurant. Moreover, the officers of both defendants were alleged to be the same persons; the owners as set by the hotel company to the liability insurance company and counsel for the insurance company in acknowledging receipt of the amount made no reference to the fact that the insurance company did not cover the management company.

A further reason why we think the court abused its discretion is that when plaintiff brought her suit she filed a written demand for a jury trial. The hotel company filed

8.

its answer and some time afterward counsel for plaintiff came in to court for an order defaulting the management company and attempted to withdraw its demand for a jury only as to the management company. We think it had no right to do this without notice to counsel for the hotel company and that the management company in this proceeding can raise this point for the reason that the failure to notify defendant's counsel that plaintiff was going to waive a jury as to the management company, would result in mulcting the management company out of \$7,500 without a hearing as it now appears.

There is another reason why the judgment cannot stand and that is that the judgment entered against the management company stood for many months, of which defendant had no notice, and it was a nullity for the reason that it showed service of process on the management company July 6, the day before the suit was brought. And when afterwards the court permitted the return to be corrected we think this, in effect, set aside the default and the management company should have been given leave to defend. Odell v. Levy, 307 Ill. 277; Dahlin v. The Maytag Co., 238 Ill. App. 85; Brown v. Smith, 24 Ill. 197; Wende v. Chicago City Ry. Co., 271 Ill. 437; Pennsylvania Cas. Co. v. Thompson, 123 Ga. 240. In the case last cited, the Supreme court of Georgia held that in the absence of a legal return of service, the court was without jurisdiction to enter a judgment by default, but on the oral argument, counsel for plaintiff said that the holding in that case had been overruled in Love v. Nat. Liberty Ins. Co., 157 Ga. 259, which latter case was followed by the Appellate court of Georgia in Hayes v. Amer. Bankers Ins. Co., 167 S. E. 731. The facts in the Thompson and Love cases are not at all similar. We think the Thompson case was not overruled as counsel contend

to think the Thompson case was not overruled as counsel contend. The facts in the Thompson and Love cases are not at all similar. et Georgia in Hayes v. Amer. Liberty Ins. Co., 107 S. E. 781, 60 S. 289, which latter case was followed by the Appellate court in Love v. Mat. Liberty Ins. Co., 157 argument, counsel for plaintiff said that the holding in that jurisdiction to enter a judgment by default, but on the oral absence of a legal return of service, the court was without last cited, the Supreme court of Georgia held that in the Pennsylvania Gas. Co. v. Thompson, 138 Ga. 340, in the case 24 Ill. 107; Wanda v. Chicago City Ry. Co., 271 Ill. 437; Dahlin v. The Mayfair Co., 238 Ill. App. 68; Brown v. Smith, been given leave to defend. Osall v. Levy, 307 Ill. 277; set aside the default and the management company should have permitted the return to be corrected we think this, in effect, before the suit was brought. And when afterwards the court service of process on the management company July 6, the day notice, and it was a nullity for the reason that it showed company stood for many months, of which defendant had no and that is that the judgment entered against the management There is another reason why the judgment cannot stand ment company out of \$7,500 without a hearing as it now appears the management company, would result in violating the manage- dant's counsel that plaintiff was going to waive a jury as to this point for the reason that the failure to notify defen- and that the management company in this proceeding can raise to do this without notice to counsel for the hotel company only as to the management company. We think it had no right company and attempted to withdraw its demand for a jury came in to court for an order defaulting the management its answer and some time afterwards counsel for plaintiff

9.

but the law as announced in the Love case was based on the statute which had been enacted after the opinion in the Thompson case.

The judgment of the Circuit court of Cook county is reversed and the matter remanded to permit the management company to file its answer so that the case may be tried.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, J., concurs.

Niemeyer, J., specially concurring.

I agree with the result but not in all that is said.

but the law as announced in the Love case was based on the statute which had been enacted after the opinion in the Thompson case.

The judgment of the Circuit court of Cook county is reversed and the matter remanded to permit the management company to file its answer so that the case may be tried.

REVERSED AND REMANDED WITH DIRECTIONS.

McIntosh, J., concurs.

McIntosh, J., specially concurring.

I agree with the result but not in all that is said.

43263

GOLDIE BUEHLER,
Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

)
) APPEAL FROM SUPERIOR
) COURT, COOK COUNTY.
)

329 I.A. 239²

PRESIDING
MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal by Albert C. Buehler seeks to reverse an order which increased the alimony of his former wife, Goldie Buehler, from \$225 to \$500 a month. Goldie Buehler will hereinafter be referred to as plaintiff and Albert C. Buehler as defendant.

On October 20, 1937 plaintiff was granted a decree of divorce from defendant on the ground of extreme and repeated cruelty. The decree allowed her \$175 a month alimony and an additional \$75 a month for each of the two children of the parties whose custody was awarded to her. The custody of the other two children was awarded to the defendant. On plaintiff's appeal from that decree we increased her allowance of alimony to \$300 a month. (Buehler v. Buehler, 305 Ill. App. 609.) Defendant petitioned for and was allowed an appeal to the Supreme court which reversed our judgment and affirmed the decree as entered by the trial court (Buehler v. Buehler, 373 Ill. 626).

On September 23, 1941 defendant filed a petition for a reduction of the support money payable to plaintiff under the original decree. He asked in said petition that plaintiff's allowance of \$175 a month be reduced and that he be relieved from paying her \$75 a month for the support of Albert Buehler, Jr., who was then attending Dartmouth College at his father's expense. Plaintiff filed an answer to said petition denying that defendant was entitled to the relief sought and she also filed a cross-petition for an increase in her alimony. The

ALBERT C. BARNETT, Appellant.
 v.
 GOLDIE BARNETT, Appellee.
 DISTRICT COURT, COOK COUNTY, ILLINOIS.

PRESENTING
 MR. JUSTICE, IN HIS OPINION OF THE COURT.

This appeal by Albert C. Barnett seeks to reverse an order which increased the alimony of his former wife, Goldie Barnett, from \$200 to \$300 a month. Goldie Barnett will hereinafter be referred to as plaintiff and Albert C. Barnett as defendant.

On October 20, 1937 plaintiff was granted a decree of divorce from defendant on the ground of extreme and repeated cruelty. The decree allowed her \$175 a month alimony and an additional \$75 a month for each of the two children of the parties whose custody was awarded to her. The custody of the other two children was awarded to the defendant. On plaintiff's appeal from that decree we reversed her allowance of alimony to \$300 a month. (Barnett v. Barnett, 305 Ill. App. 609.) Defendant petitioned for and was allowed an appeal to the supreme court which reversed our judgment and affirmed the decree as entered by the trial court. (Barnett v. Barnett, 373 Ill. 626.)

On September 23, 1941 defendant filed a petition for a reduction of the support money payable to plaintiff under the original decree. He asked in said petition that plaintiff's allowance of \$175 a month be reduced and that he be relieved from paying her \$75 a month for the support of Albert Barnett, Jr., who was then attending Lombard College of his father's expense. Plaintiff filed an answer to said petition denying that defendant was entitled to the relief sought and she also filed a cross-petition for an increase in her alimony. The

trial court entered an order on April 23, 1942 increasing plaintiff's alimony from \$175 to \$225 a month and relieving defendant of the payment to plaintiff of \$75 a month for the support of Albert, Jr. In that proceeding the order of the trial court increasing plaintiff's alimony \$50 a month was predicated primarily on the fact that defendant's net income for 1941 was about \$3,000 more than his net income for 1937, when the decree of divorce was entered. Upon defendant's appeal from the order increasing plaintiff's alimony to \$225 a month said order was affirmed (Buehler v. Buehler, 318 Ill. App. 641, Abst.). Prior to the instant appeal and in addition to the last mentioned appeal defendant has perfected five other appeals since the entry of the decree of divorce from orders entered by the trial court in favor of plaintiff. Four of these appeals were from orders of the trial court allowing plaintiff attorneys' fees and the fifth from an order which construed portions of the original decree in plaintiff's favor. This latter order was entered as the result of a supplemental proceeding instituted by the filing of a petition by defendant seeking a construction favorable to him of certain provisions of the original decree of divorce relating to a parcel of real estate and the building thereon which had been theretofore occupied by the parties as their dwelling. These five appeals were determined by this court adversely to defendant.

Plaintiff instituted the instant supplemental proceeding on May 3, 1944 by filing a petition for an increase in alimony and presenting same to the Honorable U. S. Schwartz after timely notice to the attorneys who had represented defendant in four or five of the preceding supplemental proceedings and in his appeals from the orders entered therein. Plaintiff's petition recited that she was no longer receiving any money from defendant for the support of Barbara Buehler or Albert C. Buehler, Jr., whose custody had been awarded to her; that Barbara had

trial court entered an order on April 23, 1942 increasing plaintiff's alimony from \$175 to \$225 a month and relieving defendant of the payment to plaintiff of \$75 a month for the support of Albert, Jr. In that proceeding the order of the trial court increasing plaintiff's alimony \$70 a month was predicated primarily on the fact that defendant's net income for 1941 was about \$3,000 more than his net income for 1939, when the decree of divorce was entered. Upon defendant's

appeal from the order increasing plaintiff's alimony to \$225 a month said order was affirmed (Whelan v. Whelan, 118 Ill. App. 2d, 1st). Prior to the instant appeal and in addition

to the last mentioned appeal defendant has perfected five other appeals since the entry of the decree of divorce from orders entered by the trial court in favor of plaintiff. Four of these appeals were from orders of the trial court allowing

plaintiff attorneys' fees and the fifth from an order which construed portions of the original decree in plaintiff's favor.

This latter order was entered as the result of a supplemental proceeding instituted by the filing of a petition by defendant seeking a construction favorable to him of certain provisions of the original decree of divorce relating to a parcel of real estate and the building thereon which had been theretofore occupied by the parties as their dwelling. These five appeals were determined by this court adversely to defendant.

Plaintiff instituted the instant supplemental proceeding

on May 3, 1944 by filing a petition for an increase in alimony and praying same to the honor of U. S. Schwartz after timely

notice to the attorneys who had represented defendant in four or five of the preceding supplemental proceedings and in his appeals from the orders entered therein. Plaintiff's petition recited that she was no longer receiving any money from defendant for the support of Barbara Reebler or Albert C. Whelan, Jr., whose custody had been awarded to her; that Barbara had

attained her majority and was married and Albert, Jr., was in the United States military service; that in 1937 she was awarded \$175 a month alimony by the decree of divorce when defendant's income was about \$13,500 a year, from which it was necessary for him to deduct certain business expenses; that on April 23, 1942 her permanent alimony was increased to \$225 a month and that at that time his income was about \$16,500 a year less certain necessary business expenses which were approximately the same as when the decree of divorce was entered. Her petition then alleged that "defendant's present income is in excess of *** \$30,000 *** per year and that the defendant is well able to pay to the plaintiff a larger sum of money than that now being paid her; that by reason of the higher cost of living, the plaintiff's present award of *** \$225 *** per month allows her fewer necessities and conveniences than she was able to obtain even when the award was \$175 *** per month." Her petition concluded with the prayer that her alimony should be increased to not less than \$600 a month.

On May 3, 1944 Judge Schwartz ordered defendant to answer plaintiff's petition within ten days. On May 18, 1944 defendant appeared specially and filed a "Motion and Petition" which challenged the right of Judge Schwartz to assume and retain jurisdiction to hear plaintiff's petition of May 3, 1944 for an increase in alimony and asked that the order entered by Judge Schwartz on May 3, 1944 be vacated and set aside.

Said petition of defendant set forth a general order entered by the Executive Committee of the Superior Court of Cook County on July 6, 1943, the pertinent portions of which are as follows:

"IT IS FURTHER ORDERED that all motions, subsequent to final decree in even-numbered cases filed up to and including Wednesday, March 22, A. D. 1939, and in cases assigned to

-1-

attained her majority and was married and Albert, Jr., was in the United States military service; that in 1937 she was awarded \$150 a month alimony by the decree of divorce when defendant's income was about \$13,500 a year, from which it was necessary for him to deduct certain business expenses; that on April 22, 1943 her permanent alimony was increased to \$175 a month and that at that time her income was about \$16,500 a year less certain necessary business expenses which were approximately the same as when the decree of divorce was entered. Her petition then alleged that "defendant's present income is in excess of \$20,000 per year and that the defendant is well able to pay to the plaintiff a larger sum of money than that now being paid her; that by reason of the higher cost of living, the plaintiff's present need of \$225 per month allows her fewer necessities and conveniences than she was able to obtain even when the award was \$175 per month." Her petition concluded with the prayer that her alimony should be increased to not less than \$300 a month.

On May 3, 1944 Judge Schwartz ordered defendant to answer plaintiff's petition within ten days. On May 18, 1944 defendant appeared specially and filed a "Motion and Petition" which challenged the right of Judge Schwartz to assume and retain jurisdiction to hear plaintiff's petition of May 3, 1944 for an increase in alimony and asked that the order entered by Judge Schwartz on May 3, 1944 be annulled and set aside.

Said petition of defendant set forth a general order entered by the Executive Committee of the Superior Court of Cook County on July 6, 1943, the pertinent portions of which are as follows:

"IT IS ORDERED that all motions, subsequent to final decree in even-numbered cases filed up to and including Wednesday, March 22, A. D. 1939, and in cases assigned to

Divorce Calendar No. 1 from Wednesday, March 22, A. D. 1939, shall be heard by the Judge calling Divorce Calendar No. 1 [Judge John A. Sbarboro].

"IT IS FURTHER ORDERED that no Judge, other than one regularly assigned to hear divorce, separate maintenance, annulment and cases of a kindred nature, shall hear any of such cases except on special assignment of such cases by the Head of the Chancery Division."

Defendant's petition then alleged in substance that a final decree of divorce was granted to Goldie Buehler in an even-numbered case; that by virtue of the foregoing order of the Executive Committee "all motions subsequent to final decree in even-numbered cases are assigned to divorce calendar number 1 and to be heard by the Judge calling divorce calendar number 1"; that said order was in full force and effect on May 3, 1944; that "by virtue of another order of the Executive Committee of the Superior Court of Cook County, Illinois, entered July 6, 1943, the Hon. U. S. Schwartz was assigned to hear chancery cases (other than divorce, separate maintenance, annulment and kindred cases) and was assigned to hear chancery calendar number 2"; that Judge Sbarboro, having been assigned to "Divorce Calendar No. 1" was "regularly^{assigned}/to hear the matter of the petition for increase of alimony filed by plaintiff on May 3, 1944, and no other judge may, under the rules and orders of the Superior Court of Cook County, Illinois, proceed to act upon or in respect to said matter"; that plaintiff's petition of May 3, 1944 for increased alimony "has never been regularly or especially assigned to the Hon. U. S. Schwartz"; and that "Hon. U. S. Schwartz has not since July 6, 1943, been assigned to hear divorce calendar number 1 and since the same date has not been assigned to hear divorce, separate maintenance, annulment and cases of a kindred nature."

So far as pertinent to defendant's challenge of the

Divorce Calendar No. 1 from Wednesday, March 22, A. D. 1939, shall be heard by the Judge calling Divorce Calendar No. 1 [Judge John A. Sparrow].

"IT IS FURTHER ORDERED that no Judge, other than one regularly assigned to hear divorce, separate maintenance, annulment and cases of a kindred nature, shall hear any of such cases except on special assignment of such cases by the Head of the Chancery Division."

Defendant's petition then alleged in substance that a final decree of divorce was granted to Goldie Wheeler in an even-numbered case; that by virtue of the foregoing order of the Executive Committee "all motions subsequent to final decree in even-numbered cases are assigned to divorce calendar number 1 and to be heard by the Judge calling divorce calendar number 1"; that said order was in full force and effect on July 3, 1944; that "by virtue of another order of the Executive Committee of the Superior Court of Cook County, Illinois, entered July 6, 1943, the Hon. U. S. Schwartz was assigned to hear chancery cases (other than divorce, separate maintenance, annulment and kindred cases) and was assigned to hear chancery calendar number 2"; that Judge Sparrow, having been assigned to "Divorce Calendar No. 1" was "regularly assigned to hear the matter of the petition for increase of alimony filed by Plaintiff on July 3, 1944, and no other Judge may, under the rules and orders of the Superior Court of Cook County, Illinois, proceed to act upon or in respect to said matter"; that Plaintiff's petition of July 3, 1944 for increased alimony "has never been regularly or especially assigned to the Hon. U. S. Schwartz"; and that "Hon. U. S. Schwartz has not since July 6, 1943, been assigned to hear divorce calendar number 1 and since the same date has not been assigned to hear divorce, separate maintenance, annulment and cases of a kindred nature."

So far as pertinent to defendant's challenge of the

jurisdiction of Judge Schwartz because of the aforesaid general order of the Superior court, the prayer of his petition was that "the matter of plaintiff's petition of May 3, 1944, asking an increase of alimony be transferred to the head of the Chancery Division of the Superior Court of Cook County, Illinois, for assignment to divorce calendar number 1."

Defendant's petition also averred certain violations by plaintiff of section 6 of rule 60 of the Superior court. These alleged violations will be hereinafter considered.

Plaintiff filed an answer to defendant's foregoing petition in which she alleged in substance that this cause was properly assigned to Judge Schwartz and that he had jurisdiction of same; that "on or about September of 1941, defendant filed a petition in this cause for reduction of alimony and support money and that at that time, this cause was assigned by the then head of the chancery division, the Honorable Peter H. Schwaba, to the Honorable Joseph Sabath, then hearing Divorce Calendar No. 2"; that Judge Sabath transferred the cause "to the Executive Committee for reassignment and on or about February of 1942, said cause was, by the Executive Committee of the Superior court through its head of the chancery division, assigned to the calendar of the Honorable John C. Lewe who was then hearing Chancery Calendar No. 2 which, unless specially assigned, did not include divorce, separate maintenance, annulment and kindred cases"; that Judge Lewe "entered several orders in connection with the matter then pending before him"; that "in June of 1942 the Executive Committee of the Superior court assigned Judge Lewe to hear a law calendar during the court year commencing September 1942 and assigned Judge Schwartz to take over Chancery Calendar No. 2 as Judge Lewe's successor"; that "Judge Schwartz is still assigned to hear Chancery Calendar No. 2 and that therefore this cause is properly pending before

jurisdiction of Judge Schwartz because of the foregoing
general order of the Superior Court, the prayer of his peti-
tion was that "the matter of plaintiff's petition of May 2,
1944, relating to divorce be transferred to the head
of the necessary division of the Superior Court of Cook County,
Illinois, for assignment to divorce calendar number 1."
Before his petition was served certain violations
of plaintiff's petition of section 5 of rule 60 of the Superior Court.
These alleged violations will be hereinafter considered.
Plaintiff filed an answer to defendant's foregoing
petition in which she alleged in substance that this case
was properly assigned to Judge Schwartz and that he had juris-
diction of same; that "on or about September 11, 1944, plaintiff
and filed a petition in this cause for violation of alimony
and support money and that at that time, this cause was
assigned by the then head of the necessary division, the
Honorable Peter H. Schwartz, to the Honorable Joseph Schwartz,
then hearing divorce calendar No. 2; that Judge Schwartz trans-
ferred the cause to the Executive Committee for management
and on or about February of 1945, said cause was, by the
Executive Committee of the Superior Court through its head
of the necessary division, assigned to the calendar of the
Honorable John V. Lane who was then hearing divorce calendar
No. 2 which, unless specially assigned, did not include
divorce, separate maintenance, annulment and kindred cases;
that Judge Lane "entered several orders in connection with the
cause then pending before him; that in June of 1945 the
Executive Committee of the Superior Court assigned Judge Lane
to hear a law calendar during the coming year commencing
September 1945 and assigned Judge Schwartz to take over
divorce calendar No. 2 as Judge Lane's successor; that
Judge Schwartz is still assigned to hear divorce calendar
No. 2 and that therefore this case is properly pending before

him having theretofore been specially assigned to said calendar by the Executive Committee"; that it was necessary and proper for plaintiff to present her petition of May 3, 1944 before Judge Schwartz; and that "the action of the Honorable U. S. Schwartz in entering the petition of May 3, 1944 is and was in full force and effect and is binding upon the respondent."

On May 23, 1944 Judge Schwartz entered the following order:

"This motion coming on to be heard upon the petition of defendant filed May 18, 1944 for transfer of the cause to the Executive Committee for reassignment by the head of the Chancery Division, and the plaintiff having filed her answer to said petition, and the parties being represented in court by their counsel, and the court being fully advised in the premises,

"IT IS ORDERED that said petition be and the same is hereby denied, and ***

"IT IS FURTHER ORDERED that the defendant have leave to plead to the petition of plaintiff for an increase in alimony on or before May 29, 1944, and the cause is set for hearing on June 16, 1944."

On May 24, 1944 the following order was entered by Judge Joseph A. Graber, Head of the Chancery Division:

"On Motion of the court

"WHEREAS, defendant has presented a petition and argued to the effect that the Hon. U. S. Schwartz lacks jurisdiction to hear this cause, because of general orders of this court; and

"WHEREAS, the Hon. U. S. Schwartz having ruled to the contrary, and having found that this cause is specially assigned to Chancery Calendar No. 2, to which Calendar Judge Schwartz has been assigned; and

"WHEREAS, it is thought desirable to clear up any doubt that the defendant may have to the contrary:

"IT IS THEREFORE ORDERED that this cause be and it is hereby assigned to Chancery Calendar No. 2."

On May 26, 1944 defendant presented a motion to Judge Graber to vacate the order entered by him on May 24, 1944 assigning the cause to "Chancery Calendar No. 2". Judge Graber continued this motion to May 29, 1944 and it was again continued to May 31, 1944, when Judge Schwartz, hearing Judge Graber's motions because of the latter's absence on

his having theretofore been specially assigned to said calendar by the Executive Committee; that it was necessary and proper for plaintiff to present her petition of May 2, 1944 before Judge Schwartz; and that "the action of the Honorable U. S. District Court in entering the petition of May 2, 1944 is and was in full force and effect and is binding upon the respondent."

On May 23, 1944 Judge Schwartz entered the following

order:

"This motion coming on to be heard from the petition of defendant filed May 18, 1944 for transfer of the cause to the Executive Committee for assignment by the name of the Honorable U. S. District Court, and the plaintiff having filed her answer to said petition, and the parties being represented in court by their counsel, and the court being fully advised in the premises,

"IT IS ORDERED that said petition be and the same is hereby denied, and the

"IT IS FURTHER ORDERED that the defendant have leave to plead to the petition of plaintiff for an increase in attorney on or before May 29, 1944, and the cause is set for hearing on June 10, 1944."

On May 24, 1944 the following order was entered by

Judge Joseph A. Graber, head of the Chemistry Division:

"On Motion of the court

"WHEREAS, defendant has presented a petition and moved to the effect that the Hon. U. S. District Court jurisdiction to hear this cause, because of general orders of this court; and

"WHEREAS, the Hon. U. S. District Court having ruled to the contrary, and having found that this cause is specially assigned to Chemistry Calendar No. 2, to which Calendar Judge Schwartz has been assigned; and

"WHEREAS, it is thought desirable to clear up any doubt that the defendant may have to the contrary;

"IT IS THEREFORE ORDERED that this cause be and it is hereby assigned to Chemistry Calendar No. 2."

On May 26, 1944 defendant presented a motion to Judge

Graber to vacate the order entered by him on May 24, 1944

assigning the cause to "Chemistry Calendar No. 2", Judge

Graber continued this motion to May 29, 1944 and it was again

continued to May 31, 1944, when Judge Schwartz, hearing

Judge Graber's motion because of the latter's absence on

account of illness, entered the following order:

"On Motion of Attorney for defendant to vacate the order entered by Judge Graber on May 25 [24], 1944 assigning this cause to Chancery Calendar No. 2;

"IT IS HEREBY ORDERED that said motion to vacate said order of May 25 [24], 1944 be and the same is hereby denied."

That Judge Schwartz was regularly assigned to hear Judge Graber's motions on May 31, 1944 is not questioned.

Defendant first contends that "the filing of petitioner's petition of May 3, 1944 constituted the beginning of a new suit" and that "service of process on a respondent named in a petition filed by one party subsequent to a final decree for divorce is essential for the purpose of acquiring jurisdiction over the person of the respondent."

A similar contention was made in the last preceding appeal by defendant from an order entered by Judge Schwartz allowing plaintiff attorneys' fees. In our opinion filed on that appeal (321 Ill. App. 630, Abst.) we said:

"The first contention is predicated on rule 60, section 6 of the Superior court, which reads: 'All applications to change or modify a final order or decree concerning alimony or the custody of children shall be by petition in writing verified by affidavit. Upon the filing and presentation thereof in satisfactory form the Court shall enter a rule on the respondent to plead, by a short day to be fixed by the Court, after service upon him of the rule and of a copy of the petition. Issues joined on such petition shall be heard at such time as the Court may order. The Court on motion of either party or on its own motion, may, in its discretion, refer the matter to a Master in Chancery as in other cases.' It is urged that serving notice of the filing of the petition on the attorneys who represented the respondent during the pendency of the divorce suit or other proceedings is not a sufficient compliance with the requirements of rule 60; that the relationship between a litigant and his attorney ceases upon the termination of the suit, and the filing of a petition constitutes the beginning of a new suit. Druce v. Druce, 313 Ill. App. 169, Jackson v. Jackson, 294 Ill. App. 508, and Des Chatelets v. Des Chatelets, 292 Ill. App. 357, are cited in support of these contentions. The Druce case does not pass upon the question under consideration and is no authority for the contention made. In the Jackson and Des Chatelets cases the only questions involved were whether a petition filed after divorce decree had been entered, to enforce payment of alimony or to modify an order affecting the custody of the children, is a suit or proceeding within the meaning of the statute relating to changes of venue (Ill. Rev. Stat. 1937, ch. 146, par. 1). We know of no case which holds that an application for solicitors' fees and expenses growing out of litigated divorce proceedings,

account of illness, entered the following order:

"On Motion of Attorney for defendant to vacate the order entered by Judge Greber on May 25, 1944 assigning this case to Honorary Calendar No. 2;

"IT IS ORDERED that said motion to vacate said order of May 25, 1944 be and the same is hereby denied."

That Judge Schwartz was regularly assigned to hear

Judge Greber's motions on May 25, 1944 is not questioned.

Defendant first contends that "the filing of peti-

tioner's petition of May 2, 1944 constituted the beginning

of a new suit" and that "service of process on a respondent

named in a petition filed by one party subsequent to a final

decree for divorce is essential for the purpose of acquiring

jurisdiction over the person of the respondent."

A similar contention was made in the last preceding

appeal by defendant from an order entered by Judge Schwartz

allowing plaintiff attorneys' fees. In an opinion filed

on that appeal (321 Ill. App. 630, 1st.) we said:

"The first contention is predicated on rule 60,

section 6 of the Superior Court, which reads: 'All

applications to change or modify a final order or decree

concerning custody of children shall be by

petition in writing verified by affidavit. Upon the filing

and presentation thereof in satisfaction to the court

shall enter a rule on the respondent to appear, by a short

day to be fixed by the court, after service upon him of the

rule and of a copy of the petition. Issues joined on such

petition shall be heard at such time as the court may order.

The court on motion of either party or on its own motion,

may, in its discretion, defer the matter to a later in

tervenor as in other cases.' It is urged that serving notice

of the filing of the petition on the attorneys who represented

the respondent during the pendency of the divorce suit or

other proceedings is not a sufficient compliance with the

requirements of rule 60; that the relationship between a

petitioner and his attorney ceases upon the termination of the

suit, and the filing of a petition constitutes the beginning

of a new suit. Thorne v. Thorne, 113 Ill. App. 109, 109, 109

Thorne v. Thorne, 113 Ill. App. 109, 109, 109, and Thorne v. Thorne

Thorne v. Thorne, 113 Ill. App. 109, 109, 109, are cited in support of these

contentions. The issue does not pass upon the question

under consideration and is no authority for the contention

made. In the Thorne and Thorne cases the only questions

involved were whether a petition filed after divorce decree

had been entered, to enforce payment of alimony or to modify an

order affecting the custody of the children, is a suit or pro-

ceeding within the meaning of the statute relating to changes

of venue (Ill. Rev. Stat. 1937, ch. 146, par. 1.). The issue of

no case which holds that an application for solicitors' fees

and expenses growing out of litigated divorce proceedings,

constitutes a new suit, and counsel cite none. It is a common form of procedure approved for decades, and so far as we know it has never been before questioned."

Our holding in that case applies with equal force to the facts and circumstances surrounding plaintiff's application for an increase in alimony in the instant case.

Defendant cites numerous cases under his "Points and Authorities" in support of his instant contention but in the "Argument" in his brief reference is made to only two of them - Cummer v. Cummer, 283 Ill. App. 220, and Feldott v. Featherstone, 290 Ill. 485, - without even attempting to show what either of those cases hold. The facts in those cases do not even remotely resemble the facts herein and since they do not support defendant's contention, it would serve no useful purpose to discuss them. Furthermore, having ultimately filed his answer to plaintiff's petition for increased alimony and joined issue on same, defendant waived the requirements of section 6 of rule 60. It should also be stated that supplemental proceedings or appeals from orders entered therein have been almost constantly before the courts since the entry of the final decree of divorce in 1937 and in all of such proceedings, except one, instituted by plaintiff, notice has been served on defendant's attorneys which he recognized as adequate service upon him by thereafter filing his answer and strenuously contesting plaintiff's right to the relief sought in each instance. The exception noted was in the proceeding in which the order was entered from which the last preceding appeal was taken. As has been seen, in that proceeding defendant also invoked section 6 of rule 60 and we determined a similar contention based on said rule adversely to him. In addition, although defendant's petition to vacate the order of May 3, 1944 did allege that the filing of plaintiff's petition constituted the institution of a new suit and that the failure to serve him personally with the rule upon him to answer and a copy of said petition con-

constitutes a new suit, and counsel cite none. It is a common form of procedure approved for decades, and so far as we know it has never been before this court.

Our holding in that case applies with equal force to

the facts and circumstances surrounding Plaintiff's appli-

cation for an increase in alimony in the instant case.

Defendant cites numerous cases under his "Point and

Authorities" in support of his instant contention but in the

"Argument" in his brief reference is made to only two of them -

Quinn v. Quinn, 283 Ill. App. 220, and Wells v. Wells, 283 Ill. App. 220.

280 Ill. 487, - without even attempting to show what either of

those cases hold. The facts in those cases do not even remotely

resemble the facts herein and since they do not support defend-

ant's contention, it would serve no useful purpose to discuss

them. Furthermore, having ultimately filed his answer to

Plaintiff's petition for increased alimony and joined issue on

same, defendant waived the requirements of section 6 of rule 60.

It should also be stated that supplemental proceedings or

appeals from orders entered therein have been almost constantly

before the courts since the entry of the final decree of

divorce in 1937 and in all of such proceedings, except one,

instituted by Plaintiff, notice has been served on defendant's

attorneys which he recognized as adequate service upon him by

thereafter filing his answer and strenuously contesting plain-

tiff's right to the relief sought in each instance. The excep-

tion noted was in the proceeding in which the order was entered

from which the last proceeding appeal was taken. As has been

seen, in that proceeding defendant also invoked section 6 of

rule 60 and we determined a similar contention based on said

rule adversely to him. In addition, although defendant's

petition to vacate the order of July 3, 1944 and allege that

the filing of Plaintiff's petition constituted the institution

of a new suit and that the failure to serve him personally with

the rule upon him to answer and a copy of said petition con-

stituted a violation of section 6 of rule 60 of the Superior court, an examination of the record discloses that plaintiff's alleged violation of said rule was at no time called to the attention of the trial judge and was not presented to him for determination.

This brings us to the consideration of defendant's challenge of the right of Judge Schwartz to assume and retain jurisdiction of plaintiff's petition for an increase in alimony.

Defendant asserts that under the provisions of the foregoing order of the Executive Committee of the Superior court Judge Schwartz had no right to assume and retain jurisdiction of plaintiff's petition for an increase in alimony, that said petition should properly have been presented to Judge Sbarboro, that the only matter reassigned from Judge Sabath to Judge Lewe on March 11, 1942 by Judge Schwaba, then head of the chancery division, was the petition and cross petition at that time pending before Judge Sabath and that Judge Graber's order of May 24, 1944 assigning the cause to Judge Schwartz's chancery calendar No. 2 was a nullity. Plaintiff's position in this regard is that "the judge who was assigned to hear chancery calendar No. 2 was the proper judge to hear the petition," that "that calendar was assigned to Judge Schwartz" and that the special assignment by Judge Graber of said petition to Judge Schwartz for hearing removed any possible doubt as to the latter's jurisdiction.

We deem it unnecessary to decide whether plaintiff's petition for increased alimony should have been presented to Judge Schwartz or to Judge Sbarboro because, if there was

alleged a violation of section 6 of rule 66 of the Superior Court, an examination of the record discloses that plain-
tiff's alleged violation of said rule was at no time called to the attention of the trial judge and was not presented to him for determination.

This brings us to the consideration of defendant's challenge of the right of Judge Schwartz to assume and retain jurisdiction of plaintiff's petition for an increase in alimony.

Defendant asserts that under the provisions of the foregoing order of the Executive Committee of the Superior Court Judge Schwartz had no right to assume and retain jurisdiction of plaintiff's petition for an increase in alimony, that said petition should properly have been presented to Judge Sparrow, that the only matter reassigning from Judge Sabath to Judge Lewis on March 11, 1943 by Judge Schwabe, then head of the chancery division, was the petition and cross petition at that time pending before Judge Sabath and that Judge Graber's order of May 24, 1944 assigning the cause to Judge Schwartz's chancery calendar No. 2 was a nullity. Plaintiff's position in this regard is that "the judge who was assigned to hear chancery calendar No. 2 was the proper judge to hear the petition," that "that calendar was assigned to Judge Schwartz" and that the special assignment by Judge Graber of said petition to Judge Schwartz for hearing removed any possible doubt as to the latter's jurisdiction.

It does not seem it unnecessary to decide whether plaintiff's petition for increased alimony should have been presented to Judge Schwartz or to Judge Sparrow because, if there was

any impropriety or irregularity in Judge Schwartz's initial assumption of jurisdiction, same was cured by the special assignment of the matter to Judge Schwartz by Judge Graber, head of the chancery division.

But defendant insists that Judge Graber's order of May 24, 1944 assigning the case specially to Judge Schwartz was a nullity (1) because plaintiff's petition should have been presented to Judge Sbarboro in accordance with the provisions of the general order of the Executive Committee of the Superior court and (2) because "the order was entered without any notice to respondent, Albert C. Buehler."

As has been seen, the same General Order of the Executive Committee upon which defendant relies to sustain the first of his foregoing contentions specifically provides that no Judge other than those regularly assigned "to hear divorce, separate maintenance, annulment and cases of a kindred nature" shall hear any of such cases "except on special assignment of such cases by the Head of the Chancery Division." (Italics ours.) This matter was specially assigned to Judge Schwartz by Judge Graber, the head of the chancery division, and such assignment removed any doubt of the jurisdiction of Judge Schwartz.

Defendant's contention that Judge Graber's order was entered without notice to him is completely refuted by the record. When Judge Schwartz instructed plaintiff's attorney to request Judge Graber to enter the order in question, Mr. Overmyer, one of defendant's attorneys, was present. It is undisputed on the record that at that time Mr. May, plaintiff's attorney, asked Mr. Overmyer to go with him before Judge Graber, that Mr. Overmyer said he would not go and that plaintiff's attorney "went alone and the order was entered." Defendant's attorney had personal notice that the matter was to be presented to Judge Graber and he refused to appear.

my knowledge or information in Judge Chamberlain's initial
assignment of jurisdiction, and was caused by the special
assignment of the matter to Judge Chamberlain by Judge
head of the company division.

It defendant insists that Judge Chamberlain's order of
May 24, 1944 as signed, be sent specially to Judge Chamberlain
was a nullity (1) because Chamberlain's petition should have
been presented to Judge Chamberlain in accordance with the
provisions of the general order of the Executive Committee of
the Superior Court and (2) because "the order was entered
without any notice to respondent, Albert C. Chamberlain."

As has been seen, the same General Order of the Executive
Committee upon which defendant relies to sustain the first of
his foregoing contentions specifically provides that no Judge
other than those regularly assigned "to the divorce, separate
maintenance, annulment and cases of a kindred nature" shall
hear any of such cases "except on special assignment of such
Judge by the head of the company division." (Emphasis ours.)
This matter was specially assigned to Judge Chamberlain by Judge
Graber, the head of the company division, and such assignment
removed any doubt of the jurisdiction of Judge Chamberlain.

Defendant's contention that Judge Graber's order was
entered without notice to him is completely refuted by the
record. When Judge Graber instructed Plaintiff's attorney
to request Judge Graber to enter the order in question, Mr.
Overmyer, one of defendant's attorneys, was present. It is
undisputed on the record that at that time Mr. Overmyer
told Mr. Overmyer to go with him before
Judge Graber, that Mr. Overmyer said he would not go and that
Plaintiff's attorney "went alone and the order was entered."
Defendant's attorney had personal notice that the matter was
to be presented to Judge Graber and he refused to appear.

On May 29, 1944 defendant filed an answer to plaintiff's petition for increased alimony, in which he alleged in substance that said petition failed to state a cause of action and that she was not entitled to the relief sought.

We will now consider on its merits plaintiff's claim for increased alimony. The pertinent portions of the order of July 1, 1944, from which this appeal was taken are as follows:

"That under a previous order of this court entered on or about the 23rd day of April, 1942, the Petitioner's alimony was increased from *** \$175 *** to \$225 *** per month,

"That after the date said last order was entered the income tax laws of the United States of America have been amended so as to permit a person paying alimony to deduct the amount so paid as a deductible expense, and the person receiving the alimony is required to pay an income tax on the alimony so received; as a result thereof, the Respondent, Albert C. Buehler, has gained an advantage, and the Petitioner, Goldie Buehler, has suffered a disadvantage.

"That the Petitioner, Goldie Buehler's needs have increased, especially by reason of the higher cost of living and because of the amended income tax law, and that her income tax on her present alimony is approximately *** \$500 *** per year.

"That Defendant's pecuniary capacity to pay, as adduced by the evidence, has substantially improved as compared to the time the last order for an increase in alimony was entered, said improvement being at the least *** \$13,800 *** per year, and in all probability, including indirect earnings very substantially in excess thereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

"(a) That the decretal order heretofore entered on April 23rd, 1942 be and hereby is modified so that the award of permanent alimony to the Plaintiff be and the same is hereby increased from the sum of *** \$225 *** per month to *** \$500 *** per month, and that the said permanent alimony be hereafter paid to the Plaintiff by the Defendant at the rate of *** \$250 *** on the 1st and 15th days of each and every month.

"(b) That the Defendant pay to the Plaintiff within twenty days herefrom, the sum of *** \$550 *** as and for additional alimony, from May 3rd, 1944 to and including June 30th, 1944."

The only witnesses who testified in this matter were plaintiff and defendant. Goldie Buehler's testimony, so far as material, was that she was receiving \$225 a month alimony from defendant at the time of the hearing; that she had no additional income; that on April 23, 1942 her alimony was increased from \$175 to \$225 a month; that at the time of

On May 23, 1944 defendant filed an answer to plaintiff's petition for increased alimony, in which he alleged in substance that said petition failed to state a cause of action and that she was not entitled to the relief sought. He will now consider on its merits plaintiff's claim for increased alimony. The pertinent portions of the order of July 1, 1944, from which this appeal was taken are as follows:

"That under a previous order of this court entered on or about the 23rd day of April, 1942, the Plaintiff's alimony was increased from \$125.00 to \$225.00 per month.

"That after the date said last order was entered the income tax laws of the United States of America have been amended so as to permit a person paying alimony to deduct the amount so paid as a deductible expense, and the person receiving the alimony is required to pay an income tax on the alimony so received; as a result thereof, the Plaintiff, Albert C. Mueller, has gained an advantage, and the Plaintiff's wife, Goldie Mueller, has suffered a disadvantage.

"That the Plaintiff, Goldie Mueller's needs have increased especially by reason of the higher cost of living and because of the amended income tax law, and that her income tax on her present alimony is approximately \$200.00 per year.

"That defendant's pecuniary capacity to pay, as advanced by the evidence, has substantially improved as compared to the time the last order for an increase in alimony was entered, and improvement being at the least \$12,000.00 per year, and in all probability, including indirect earnings very substantially in excess thereof.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

"(a) That the decretal order heretofore entered on April 23rd, 1942, be and lawfully is modified so that the award of permanent alimony to the Plaintiff, be and the same is hereby increased from the sum of \$225.00 per month to \$350.00 per month, and that the said permanent alimony be hereafter paid to the Plaintiff by the Defendant at the rate of \$290.00 on the 1st and 15th days of each and every month.

"(b) That the Defendant pay to the Plaintiff within twenty days heretofore, the sum of \$290.00 as and for additional alimony, from May 3rd, 1944 to and including June 30th, 1944."

The only witnesses who testified in this matter were Plaintiff and defendant. Goldie Mueller's testimony, so far as material, was that she was receiving \$225 a month alimony from defendant at the time of the hearing; that she had no additional income; that on April 23, 1942 her alimony was increased from \$125 to \$225 a month; that at the time of

such increase she was not required to pay any income tax on her alimony but that sometime thereafter she was required to pay an income tax on same; that her estimated income tax for 1944 on the basis of her \$225 a month alimony was approximately \$500; that she used her alimony solely for her own living expenses; that she "can't buy the same things as she could" when her alimony was \$175 a month; that she lived with her mother and father; that she and her mother "do all of the housework *** all of the cleaning and washing and ironing and windows and anything and everything around the house"; and that the title to the property where she lived was "still as it was in 1941 *** in my mother's and my father's and my name."

Albert C. Buehler testified in substance at the hearing in June 1944 that in July 1942 he married Fern Davis who had been his secretary in 1932; that for several years prior to his remarriage he lived in a seven-room house in Barrington, Illinois; that after his remarriage his family consisted of his present wife, his youngest daughter Rose Marie and his oldest son Carl until the latter entered the United States military service in May 1944; that in January 1944 his present wife purchased the Barrington property which included the home and approximately six acres of land, making a cash payment of \$6,000 with her own funds, the balance of the purchase price to be paid in monthly installments on a mortgage; that he was "paying no part of it except through the household money he gave her for maintaining the home *** she makes a payment of \$137.50 a month"; that also in January 1944 his son Carl, who was then 24 years old and being paid a salary of \$10,000 a year by the Victor Adding Machine Company, purchased the adjoining six acres of land; that "in 1943 my household expenses were \$4600 a year, I either paid myself or gave Mrs. Buehler to pay"; that such expenses included rent of \$2400 a year and \$900 a year for a maid; that it was hard for him to say what items of living

such income she was not required to pay any income tax on her alimony but that sometime thereafter she was required to pay an income tax on same; that her estimated income tax for 1944 on the basis of her \$250 a month alimony was approximately \$200; that she used her alimony solely for her own living expenses; that she didn't buy the same things as she could when her alimony was \$15 a month; that she lived with her mother and father; that she and her mother "do all of the housework"; all of the cleaning and washing and ironing and windows and anything and everything around the house"; and that the title to the property where she lived was "still as it was in 1941" in my mother's and my father's and my name." Robert C. Wheeler testified in substance at the hearing in June 1944 that in July 1942 he married Fern Davis who had been his secretary in 1935; that for several years prior to his marriage he lived in a seven-room house in Washington, D.C.; that after his marriage his family consisted of his present wife, his youngest daughter Rose Marie and his oldest son Carl until the latter entered the United States military service in May 1944; that in January 1944 his present wife purchased the Washington property which included the home and approximately six acres of land, making a cash payment of \$6,000 with her own funds, the balance of the purchase price to be paid in monthly installments on a mortgage; that he was "paying no part of it except through the household money he gave her for maintaining the home"; she makes a payment of \$125.00 a month; that also in January 1944 his son Carl, who was then 24 years old and being paid a salary of \$10,000 a year by the Victor Adair Machine Company, purchased the adjoining six acres of land; that "in 1943 my household expenses were \$4600 a year, I either paid myself or gave Mrs. Wheeler to pay"; that such expenses included rent of \$2400 a year and \$900 a year for a maid; that it was hard for him to say what items of living

expenses were included in the balance of \$1300 left after the rent and the maid were paid out of the \$4600; that "some cash was given to Mrs. Buehler *** maybe it was a grocery bill or something I brought home or a bill at Field's or Carsons or other expenses of the family *** I do not know the details"; that his present wife had a bank account and he gave her money but he did not know how much he gave her during any month during 1943 or 1944 or during either of those years; that out of whatever money he gave her she paid "the same type of bills I was paying"; that he did not know what the heating bill was for 1943 but that it was not included in the \$4600 household expenses and neither was the \$950 he paid for sending his daughter Rose Marie to Elgin Academy nor purchases made by him, which were paid for by the Victor Adding Machine Company and charged to his personal account.

He further testified that he estimated his household expenses for 1944 at \$4400 (this did not include rent but it did include the monthly payments of \$137.50 on the mortgage on the home); that he was privileged to use any of the 18 cars that belonged to the Victor Adding Machine Company without expense to him but that he usually used a Cadillac or a Chevrolet; that he owned a Plymouth car for the use of his family upon which he had to pay the insurance, operating expenses and upkeep; that he owned two horses and belonged to the Chicago Athletic Association and the Barrington Hills Country Club; that he had charge accounts for himself and family at Marshall Field and Company, Carson Pirie Scott and Company, Von Lengerke & Antoine, Mandel Brothers, Chas. A. Stevens and Company, Best and Company and Spees in Elgin; and that he did not even know what he gave his wife for household expenses in May 1944, the month before he testified.

He further testified that he was "Chairman of the Board" of the Victor Adding Machine Company at a salary of \$2500 a

expenses were included in the balance of \$1300 left after the rent and the bill were paid out of the \$4000; that "some cash was given to Mr. [redacted] when it was a grocery bill or something I brought home or a bill at [redacted] or [redacted] or other expenses of the family" I do not know the details; that his parent who had a bank account and he gave her money

but he did not know how much he gave her during any month during 1943 or 1944 or during either of those years; that out of whatever money he gave her the paid "the same type of bills I was paying"; that he did not know what the heating bill was for 1943 but that it was not included in the \$4000 household

expenses and neither was the \$250 he paid for heating his daughter Rose Marie to [redacted] not paid for by the Victor [redacted] Machine Company and charged to his personal account.

He further testified that he estimated his household expenses for 1944 at \$4000 (this did not include rent but it did include the monthly payments of \$137.50 on the mortgage on the home); that he was privileged to use any of the 18 cars that belonged to the Victor [redacted] Machine Company without

expenses to him but that he usually used a Cadillac or a Chevrolet; that he owned a Plymouth car for the use of his family upon which he had to pay the insurance, operating expenses and upkeep; that he owned two horses and belonged to the Chicago Athletic Association and the Harrison Hills Country Club; that he had charge accounts for himself and family at Marshall Field and Company, Carson Pirie Scott and Company, Von [redacted] Brothers, Chase, Stevens and Company, Best and Company and [redacted] and [redacted]; that he did not even know what he gave his wife for household expenses in May 1944, the month before he testified.

He further testified that he was "Chairman of the Board" of the Victor [redacted] Machine Company at a salary of \$2500 a

month or \$30,000 a year and that he was a director of Buehler Brothers; that he owned directly or indirectly 20 or 22% of the stock of each of those companies, which were family owned corporations - he and his three brothers and his mother owning more than 90% of the stock; that prior to the entry of the divorce decree both companies paid dividends but thereafter they ceased to do so; that the Victor Adding Machine Company had accumulated a cash surplus of \$400,000; made a profit of \$150,000 after taxes in 1943 and would make a profit of approximately \$175,000 after taxes in 1944; that Buehler Brothers profit after taxes in 1943 was about \$63,000 but that he thought it would make only a nominal profit in 1944; that the Victor Adding Machine Company had a pension fund (Victor Management Fund) and under a "formula" said company deposited in such fund to defendant's credit three and one-half dollars for every dollar he deposited each year; that in 1943 he deposited \$1200 in said pension fund and the Victor Adding Machine Company deposited therein to his credit three and one-half times that amount or \$4200; that he was depositing in the pension fund in 1944 \$250 a month or \$3,000 a year and that the Victor Adding Machine Company would deposit to his credit that year three and one-half times that amount or \$10,500; that since April 23, 1942, when plaintiff's alimony was increased to \$225 a month he took out additional life insurance which required the payment of \$2400 more in premiums than he paid in 1942; that plaintiff was not the beneficiary of any of his life insurance; that he estimated his income tax for 1944 at \$9550 after giving himself credit for all allowable deductions, including \$3600 in alimony; and that this \$3600 comprised the \$2700 a year alimony which plaintiff was then receiving and \$900 which he had been ordered to pay her for attorneys' fees.

The law applicable to plaintiff's petition for increased alimony is clearly enunciated in Smith v. Smith, 334 Ill. 370,

month or 30,000 a year and that it was a director of Brothers; that it owned directly or indirectly 20 or 25% of the stock of each of those companies, which were family-owned corporations - he and his three brothers and his mother owning more than 90% of the stock; that prior to the entry of the divorce decree both companies paid dividends but thereafter they ceased to do so; that the Victor Lining Machine Company had accumulated a cash surplus of 400,000; made a profit of 150,000 after taxes in 1943 and would make a profit of approximately 150,000 after taxes in 1944; that Brothers made a profit of approximately 150,000 after taxes in 1943 and would make a profit of approximately 150,000 after taxes in 1944; that the Victor Lining Machine Company had a pension fund (Victor Lining Machine Fund) and under a "formula" said company deposited in such fund to defendant's credit three and one-half dollars for every dollar he deposited each year; that in 1943 he deposited 1200 in said pension fund and the Victor Lining Machine Company deposited therein to his credit three and one-half times that amount or 4200; that he was depositing in the pension fund in 1944 1250 a month or 15,000 a year and that the Victor Lining Machine Company would deposit to his credit that year three and one-half times that amount or 45,000; that since April 23, 1942, when plaintiff's alimony was increased to 225 a month he took out additional life insurance which required the payment of 2400 more in premiums than he paid in 1942; that plaintiff was not the beneficiary of any of his life insurance; that he estimated his income tax for 1944 at 950 after giving himself credit for all allowable deductions, including 3600 in alimony; and that this 3600 comprised the 2700 a year alimony which plaintiff was then receiving and 900 which he had been ordered to pay her for attorney's fees.

The law applicable to plaintiff's petition for increased alimony is clearly enunciated in Smith v. Smith, 354 Ill. 370,

where the court said at p. 382:
the

"It is settled construction of section 18 [par. 19, chap. 40, Ill. Rev. Stat. 1945] that it authorizes the change of a decree for alimony based only upon a changed condition or betterment of property qualifications after the decree to meet additional needs of one entitled to alimony arising after the decree. This is the only ground justifying or authorizing a readjustment of alimony by supplemental decree. (Cole v. Cole, 142 Ill. 19; Herrick v. Herrick, 319 id. 146.)"

It will be noted that the trial court in the order appealed from considered plaintiff's additional needs and defendant's increased ability to contribute to such needs only from April 23, 1942, the date of the last previous order which granted plaintiff an increase in alimony from \$175 to \$225 a month.

It clearly appears that plaintiff's needs have increased substantially since her alimony was increased from \$175 to \$225 a month on April 23, 1942. According to her testimony she "can't buy the same things" with the \$225 a month that she was able to purchase when her alimony was \$175 a month. It is a matter of common knowledge that the cost of living has increased greatly since April 23, 1942. In addition she was not required to pay income taxes on her alimony at that time. Her estimated income tax for 1944 on her alimony of \$225 a month or \$2700 a year was approximately \$500.

Defendant contends that plaintiff's obligation to pay income taxes on her alimony, which has arisen since the aforesaid order of April 23, 1942 increasing her alimony to \$225 a month, should not be considered in the nature of an additional need on her part and that "the Congress intended to place the burden of paying federal income taxes upon the person receiving alimony." A similar contention was made in Jacobs v. Jacobs, 328 Ill. App. 133, where the court said at pp. 137, 140, 141 and 142:

"When the divorce decree was entered in 1941, alimony paid by defendant to plaintiff ~~could~~ not be deducted from the gross income of the defendant in determining the net income tax payable by the defendant under the provisions of the Internal Revenue Code, nor was the alimony received by the plaintiff subject to an income tax. Under the provisions of subsection (k) of section 22 of the Internal Revenue Act, effective October 21, 1942, alimony paid by the defendant in accordance with the provisions of the divorce decree was deductible from defendant's gross income in determining his net income subject to income tax; and the alimony received by plaintiff was subject to an income tax. ***

"Defendant's next contention leads us to a consideration of whether the court can modify the terms of a divorce decree on the ground that the change in the federal income tax law in 1942 caused a material change in the financial status of the plaintiff. This question has not heretofore been determined in Illinois. On oral argument before this court, defendant's counsel maintained that the court was precluded from adjusting plaintiff's alimony, on the theory that the rights of the parties were determined and fixed by the divorce decree in 1941. He also urged, for the same reason, that an increase in the husband's income taxes after the entry of the decree would not warrant a reconsideration by the chancellor, of the alimony paid by the husband, in the event he should petition for a reduction. At the trial of the case, the chancellor indicated that the plaintiff was attempting to defeat the intent of congress in amending the income tax law, by transferring her tax burden to the defendant. Plaintiff's income tax expenditures, it seems to us, cannot be distinguished from any other of her necessary expenses, such as those for food, shelter, and clothing, all being equally necessary for her maintenance. In the recent case of Kraunz v. Kraunz, 293 N. Y. 152, an action for separation involving a change in the financial circumstances due to the amendment of the Internal Revenue Code, sec. 22, subd. (k), substantially the same arguments were advanced as in the case at bar. At page 156, the court said:

"In fixing the alimony to be paid by a defendant under a judgment of separation presently granted the court would certainly take into account the income and other taxes which the wife and husband would probably be compelled to pay. Only the balance which remains after such payment will be available for the support or enjoyment of either husband or wife. No public policy embodied in the tax statutes is thwarted by the courts when they direct a defendant in a matrimonial action to pay to his wife for her support and for the maintenance of his children a sum commensurate with his financial ability to pay and sufficient to furnish proper support after taxes are paid. Justice requires that the amount of alimony should be measured by that standard both when the judgment is granted and when application is made for its modification."

The only case cited by defendant in support of his contention that plaintiff's obligation to pay income taxes on the alimony received by her should not be considered in the nature of an additional need on her part is Russell v. Russell, 142 Fed. (2nd) 753. There the court said at p. 754:

"It is apparent that the purpose of the Act was to re-

When the divorce decree was entered in 1941, alimony paid by defendant to plaintiff could not be deducted from the gross income of the defendant in determining the net income tax payable by the defendant under the provisions of the Internal Revenue Code, nor was the alimony received by the plaintiff subject to an income tax. Under the provisions of subsection (b) of section 23 of the Internal Revenue Act, effective October 1, 1942, alimony paid by the defendant in accordance with the provisions of the divorce decree was deductible from the defendant's gross income in determining his net income subject to income tax; and the alimony received by plaintiff was subject to an income tax.

"The defendant's next contention is that as to a consideration of whether the court can modify the terms of a divorce decree on the ground that the change in the federal income tax law in 1942 causes a material change in the financial status of the plaintiff, this question has not heretofore been determined in Illinois. On oral argument before this court, defendant's counsel maintained that the court was precluded from modifying plaintiff's alimony on the theory that the rights of the parties were determined and fixed by the divorce decree in 1941. He also urged, for the same reason, that an increase in the husband's income taken after the entry of the decree would not warrant a reconsideration by the court of the alimony paid by the husband, in the event he should obtain a partition of the real estate, the husband's interest in the property. Plaintiff was attempting to defeat two intent of Congress in passing the income tax law, by transferring the tax burden to the defendant. Plaintiff's income tax exemption, it seems to me, cannot be distinguished from any other of his tax allowances, such as for food, shelter, and clothing, all being equally necessary for his maintenance. In the recent case of Wright v. Wright, 295 U.S. 117, an action for separation involving a change in the financial circumstances due to the enactment of the Internal Revenue Code, sec. 23, subd. (b), and substantially the same arguments were advanced as in the case at bar. At page 10, the court said:

"In fixing the alimony to be paid by a defendant under a judgment of separation presently granted the court would certainly take into account the income and other taxes which the wife and husband would probably be compelled to pay. Only the balance which remains after such payment will be available for the support or enjoyment of either husband or wife. To public policy embodied in the tax statutes is attributed by the courts when they direct a defendant in a matrimonial action to pay to his wife for her support and for the maintenance of his children a sum commensurate with his financial ability to pay and with the claim to furnish proper support after taxes are paid. Justice requires that the amount of alimony should be measured by that which would remain after payment is made and when applied to the wife for her maintenance."

The only case cited by defendant in support of his contention that plaintiff's obligation to pay income taxes on the alimony received by her should not be considered in the nature of an additional need on her part is Russell v. Russell, 142

lieve a divorced husband of the tax on alimony and to impose it on the wife. It is not the function of a court of equity to readjust the tax burden in a way not intended by Congress simply because it considers it more equitable for the husband to bear all or part of the tax burden. Of course, any decrease in the wife's net income because of taxes or any other reason which brings it below what is necessary for her station in life may be considered in granting an increase. But that increase must be based upon examination of the needs of the wife in the light of the present size of the divorced husband's income, not on the theory of equitable tax adjustment."

It will be noted that the Russell case does not support defendant's contention but holds rather that "any decrease in the wife's net income because of taxes or any other reason which brings it below what is necessary for her station in life may be considered in granting an increase."

Plaintiff's additional needs since April 23, 1942, when her alimony was increased from \$175 to \$225 a month, having been shown, the only remaining question is whether there has been a betterment in defendant's income sufficient to meet such needs.

When plaintiff was awarded alimony of \$225 a month in April 1942, defendant's gross income was \$16,500 a year. At that time he was not permitted under the law to use the alimony paid by him as a deductible item in computing his income tax and plaintiff was not required to pay income taxes on her alimony. In 1944 his gross income was \$30,000 a year. He was then allowed to use the alimony paid by him as a deductible item in computing his income tax and plaintiff was required to pay income taxes on such alimony as she received. Any increase in alimony granted her in 1944 would of course entail the payment of a larger income tax by her and would correspondingly afford defendant a larger deductible alimony item in computing his income tax.

Defendant's estimated income tax was \$9550 on his \$30,000 gross income for 1944. This left him a net income after taxes for that year of \$20,450. He presented in evidence a written

each needs.

for that year of \$2,400. He presented in evidence a written
gross income for 1944. This left him a net income after taxes
of \$1,000.00. He also presented in evidence a statement of

statement prepared by him on which he set forth his estimated expenses for 1944 and the aggregate of said expenses as shown on such statement was slightly in excess of his net income.

One of such items of expense is a \$3000 "pension fund" deposit. The Victor Management Fund, according to defendant, is a pension fund. While he did not explain in detail the operations of the Victor Management Fund or who might become a contributor thereto, he did testify that he anticipated depositing \$3000 therein in 1944 and that such deposit would be implemented by a deposit to his credit of \$10,500 in said fund by the Victor Adding Machine Company. He also testified that he procured a loan of \$12,000 from the Victor Management Fund some time prior to 1944 and it may be reasonably inferred from the evidence that he was not required to pay interest on this loan. Defendant furnished only meager details as to the manner in which the Victor Management Fund operated and while the Buehler-family-owned corporation, the Victor Adding Machine Company, may have created it as a pension fund, it seems also to have served the purpose of permitting the defendant and his brothers to siphon out of the Victor Adding Machine Company a goodly portion of its profits without declaring dividends. In so far as the evidence discloses it was a matter of choice and convenience with defendant as to the amount of his deposit in the Victor Management Fund each year and the amount he might borrow from such fund without interest, at least to the extent of the deposits accumulated therein to his credit. If the anticipated deposit in 1944 of \$10,500 by the Victor Adding Machine Company in the Victor Management Fund to implement defendant's deposit of \$3000 in such fund does not represent income it bears a striking resemblance to same. In any event since there is no certainty that plaintiff will ever receive any benefit from the said \$3000 "pension fund" deposit, in our

statement prepared by him on which he set forth his estimated expenses for 1944 and the aggregate of said expenses as shown on such statement was slightly in excess of his net income.

One of such items of expense is a \$3000 "pension fund" deposit. The Victor Management Fund, according to defendant, is a pension fund. While he did not explain in detail the operations of the Victor Management Fund or who might become a contributor thereto, he did testify that he anticipated depositing \$3000 therein in 1944 and that such deposit would be implemented by a deposit to his credit of \$10,000 in said fund by the Victor Adding Machine Company. He also testified that he procured a loan of \$15,000 from the Victor Management Fund some time prior to 1944 and it may be reasonably inferred from the evidence that he was not required to pay interest on this loan. Defendant furnished only meager details as to the manner in which the Victor Management Fund operated and while the Inquirer-Examiner corporation, the Victor Adding Machine Company may have created it as a pension fund, it seems also to have served the purpose of permitting the defendant and his brothers to siphon out of the Victor Adding Machine Company a goodly portion of its profits without declaring dividends. In so far as the evidence discloses it was a matter of choice and convenience with defendant as to the amount of his deposit in the Victor Management Fund each year and the amount he might borrow from such fund without interest, at least to the extent of the deposits accumulated therein to his credit. In the anticipated deposit in 1944 of \$10,000 by the Victor Adding Machine Company in the Victor Management Fund to implement defendant's deposit of \$3000 in such fund does not represent income it bears a striking resemblance to same. In any event since there is no certainty that plaintiff will ever receive any benefit from the said \$3000 "pension fund" deposit, in our

opinion this item is not properly chargeable against plaintiff's right to increased alimony.

Included in defendant's estimated expenses for 1944 is an item of \$3700 for life insurance premiums, which exceeded by \$2400 his life insurance premiums in April 1942, when plaintiff's alimony was increased to \$225 a month. Inasmuch as plaintiff is not the beneficiary of any of this life insurance it seems to us that this \$2400 is not properly chargeable against her right to an increase in alimony.

Defendant listed as an estimated expense the purchase of \$1000 in War Bonds. If such purchase was actually made it must be considered as an investment and was not properly chargeable against plaintiff's right to an increase in alimony. Defendant also listed as an estimated expense a contribution to his son Carl of \$300. When it is considered that Carl received a salary of \$10,000 from the Victor Adding Machine Company before he entered the service and was receiving a salary from said company after he entered the service, surely this \$300 contribution to Carl should not be chargeable against plaintiff's right to an increase in alimony.

It will be noted that defendant spent \$1800 on his daughter Barbara's wedding in April 1944. His expenditure in this regard represented two-thirds of the \$2700 yearly alimony he was then paying plaintiff. It was, of course, fitting and proper that he give his daughter a rather sumptuous wedding if he could afford it and we think that he could but he sought to leave the impression by his testimony that he could not. Under the circumstances it seems to us that the entire cost of Barbara's wedding should not be chargeable against plaintiff's right to an increase in alimony.

Considering the increase in defendant's income tax since 1941 and assuming even that the cost of his daughter's wedding was a proper and necessary expense and that all of his other

opinion this law is not properly clear and legal. Plaintiff's right to a divorce is clear.

Included in defendant's estimated expenses for 1941 is an item of \$300 for life insurance premiums, which are paid by \$400 life insurance premiums in April 1942, when plaintiff's policy is increased to \$200 a month. Inasmuch as plaintiff is not the beneficiary of any of this life insurance it seems to us that this \$400 is not properly chargeable against plaintiff's right to an increase in alimony.

Defendant listed as an estimated expense the purchase of \$1000 in War Bonds. If such purchase was actually made it must be considered as an investment and was not properly chargeable against plaintiff's right to an increase in alimony. Defendant also listed as an estimated expense a contribution to his son Carl of \$300. When it is considered that Carl received a salary of \$10,000 from the Victor Talking Machine Company before he entered the service and was receiving a salary from said company after he entered the service, surely this \$300 contribution to Carl should not be chargeable against plaintiff's right to an increase in alimony.

It will be noted that defendant spent \$1200 on his daughter Barbara's wedding in April 1941. His explanation in this regard was that he rented two-thirds of the \$2700 weekly alimony he was then paying plaintiff. It was, of course, fitting and proper that he give his daughter a rather handsome wedding if he could afford it and we think that he could not. Under laws and a provision by his testimony that he could not, under the circumstances it seems to us that the entire cost of Barbara's wedding should not be chargeable against plaintiff's right to an increase in alimony.

Considering the increase in defendant's income tax since 1941 and assuming even that the cost of his daughter's wedding was a proper and necessary expense and that all of his other

estimated expenses were proper and necessary, with the exception of the aforesaid \$3000 "pension fund" deposit at the rate of \$250 a month, \$2400 for life insurance premiums, \$1000 for investment in War Bonds and the \$300 contribution to his son Carl, which excepted items amount in the aggregate to \$6700, this \$6700 was available out of defendant's net income to pay plaintiff such reasonable increase in alimony as she was entitled to. It must also be remembered that defendant charged as a necessary expense the payment of \$3600 alimony to plaintiff and that \$900 of this amount is a non-reoccurring item.

We think that a brief discussion of defendant's testimony as to his household expenses will serve to indicate his reluctance and evasiveness as a witness. It will be recalled that he testified that his household expenses in 1943 before his present wife purchased the home were \$4600. Then after he had further testified that this \$4600 included \$3300 for the payment of rent and a maid, he was at a loss to explain how all his other household expenses could have been paid out of the balance of \$1300. When he realized that his other household expenses could not possibly have been paid out of this \$1300, he refused or at least stated that he was unable to detail the household expenses that were included in the \$1300. He said that he gave his wife money to run the home but that he did not know how much he gave her and that he did not know how much he, himself, spent for his household expenses. He also said that the \$4600 did not cover purchases made by him personally, paid for by the Victor Adding Machine Company and charged to his account. When pressed for an answer as to how much of his household expenses were handled in this manner he said, "I can't tell you *** it is very difficult for me to say what was charged to the household account and the personal account."

estimated expenses were proper and necessary, with the exception of the \$300 "pension fund" deposit at the rate of \$170 a month, \$2400 for life insurance premiums, \$1000 for investment in War Bonds and the \$300 contribution to his son Carl, which exceeded items amount in the aggregate to \$6700, this \$6700 was available out of defendant's net income to pay plaintiff such reasonable increase in alimony as she was entitled to. It must also be remembered that defendant charged as a necessary expense the payment of \$3600 alimony to plaintiff and that \$200 of this amount is a non-recurring item.

He thinks that a brief discussion of defendant's testimony as to his household expenses will serve to indicate his reluctance and evasion as a witness. It will be recalled that he testified that his household expenses in 1943 before his present wife purchased the home were \$4600. Then after he had further testified that this \$4600 included \$300 for the payment of rent and a maid, he was at a loss to explain how all his other household expenses could have been paid out of the balance of \$1300. When he realized that his other household expenses could not possibly have been paid out of this \$1300, he refused or at least stated that he was unable to detail the household expenses that were included in the \$1300. He said that he gave his wife money to run the home but that he did not know how much he gave her and that he did not know how much he, himself, spent for his household expenses. He also said that the \$4600 did not cover purchases made by him personally, paid for by the Victor Talking Machine Company and charged to his account. When pressed for an answer as to how much of his household expenses were handled in this manner he said, "I can't tell you" - it is very difficult for me to say what was charged to the household account and the personal account."

In his estimated expenses for 1944 defendant included \$4400 for his household expenses and \$1500 for his personal expenses. According to his testimony the \$1500 listed for his personal expenses had nothing to do with his household expenses. Therefore, the \$4400 must have included the installment payments on the home, real estate taxes, heating and electricity, cleaning, decorating and painting, food, clothing and other accessories for his wife and his daughter Rose Marie, laundry and cleaning and pressing, purchases on the various charge accounts, feeding and caring for the two horses, the insurance on the Plymouth car and the cost of operation and upkeep of same and all other expenses ordinarily incident to the maintenance of the family home and property. Defendant testified that the money he gave his wife for household expenses included the amount necessary for the mortgage payments. That item alone amounted to \$1650 a year, to say nothing of the real estate taxes and the cost of heating.

It is perfectly obvious that \$4400 a year could not possibly cover the cost of the aforesaid items and it is a fair inference that defendant attempted to minimize his household expenses for the purpose of showing that he was living on a very moderate scale for a man of his wealth and income.

Defendant was able, as befitted his station in life, to send his daughters to private academies and his sons to college. He maintained his club memberships and numerous charge accounts in exclusive stores. While the extent of his purchases on the various charge accounts does not appear, he did testify as to some purchases made on such accounts and it is reasonable to assume that he would not maintain the seven charge accounts heretofore mentioned unless they were used at least occasionally.

The evidence discloses that he and his present wife and his children, Carl and Rose Marie, have lived in a state of comparative luxury that comported with his position as the

in his estimated expenses for 1944 defendant included \$400 for his household expenses and \$500 for his personal expenses. According to his testimony the \$500 listed for his personal expenses had nothing to do with his household expenses. Therefore, the \$400 must have included the installment payments on the home, real estate taxes, heating and electricity, cleaning, decorating and painting, food, clothing and other necessities for his wife and his daughter Rose Marie, laundry and cleaning and pressing, purchases on the various charge accounts, feeding and caring for the two horses, the insurance on the Plymouth car and the cost of operation and upkeep of same and all other expenses ordinarily incident to the maintenance of the family home and property. Defendant testified that the money he gave his wife for household expenses included the amount necessary for the mortgage payments. That item alone amounted to \$100 a year, to say nothing of the real estate taxes and the cost of heating. It is perfectly obvious that \$400 a year could not possibly cover the cost of the household items and it is a fair inference that defendant attempted to minimize his household expenses for the purpose of showing that he was living on a very moderate scale for a man of his wealth and income. Defendant was able, as befitting his station in life, to send his daughter to private academies and his sons to college. He maintained his club memberships and numerous charge accounts in exclusive stores. While the extent of his purchases on the various charge accounts does not appear, he did testify as to some purchases made on such accounts and it is reasonable to assume that he would not maintain the seven charge accounts heretofore mentioned unless they were used at least occasionally. The evidence discloses that he and his present wife and his children, Carl and Rose Marie, have lived in a state of comparative luxury that corresponded with his position as the

head of a large manufacturing company and that his other two children have fared practically as well, while his former wife, the mother of his children, has been compelled to live in a state almost bordering on penury, especially since the burden of paying income taxes on her alimony has been imposed upon her.

Defendant testified that he owed \$20,000 on a note to the Buehler Employees Security Fund, \$12,000 on a note to the Victor Management Fund, \$6500 to his brother R. O. Buehler, and \$3500 to the New England Mutual Life Insurance Company on a policy loan. It is unnecessary to discuss these loans, since defendant claimed no expense for 1944 in connection with any of them except interest on the insurance policy loan and that item was included in his estimated expenses.

The Victor Adding Machine Company has been almost exclusively engaged in the manufacture of Norden bomb sights for the Army Air Corps since early in 1942 and prior to that time in the manufacture of other defense or war devices. According to defendant he did not know when he testified whether the Victor Adding Machine Company would continue to be engaged after the war in the manufacture of bomb sights or whether it would be necessary to reconvert the plant for the manufacture of adding machines. Buehler Brothers was engaged in the meat packing business and it also operated a large number of retail stores.

In explaining why both the Victor Adding Machine Company and Buehler Brothers stopped paying dividends after 1937 defendant testified that "we have not paid dividends" and "generally speaking" we never expect to pay dividends, "because our policy has been to try and work out a program that will enable us to take a profit on a term account basis which we feel tax-wise to our advantage *** we needed the cash in the business for working capital *** we felt it would be more advanta-

head of a large manufacturing company and that his other two children have fared practically as well, while his former wife, the mother of his children, has been compelled to live in a state almost bordering on penury, especially since the burden of paying income taxes on her earnings has been imposed upon her.

Defendant testified that he owed \$20,000 on a note to the Butler Employees Security Fund, \$10,000 on a note to the Victor Management Fund, \$5,000 to his brother R. C. Mueller, and \$3,000 to the New England Mutual Life Insurance Company on a policy loan. It is unnecessary to discuss these loans, since defendant claimed no expense for 1944 in connection with any of them except interest on the insurance policy loan and that item was included in his estimated expenses.

The Victor Adding Machine Company has been almost exclusively engaged in the manufacture of Norden bomb sights for the Army Air Corps since early in 1942 and prior to that time in the manufacture of other defense or war devices. According to defendant he did not know when he testified whether the Victor Adding Machine Company would continue to be engaged after the war in the manufacture of bomb sights or whether it would be necessary to reconvert the plant for the manufacture of adding machines. Mueller Brothers was engaged in the meat packing business and it also operated a large number of retail stores.

In explaining why both the Victor Adding Machine Company and Mueller Brothers stopped paying dividends after 1937 defendant testified that "we have not paid dividends" and "generally speaking" we never expect to pay dividends, "because our policy has been to try and work out a program that will enable us to take a profit on a term account basis which we feel tax-wise to our advantage *** we needed the cash in the bank near for working capital *** we felt it would be more advanta-

geous to at some time take a capital gain, where you have a 25% tax on the capital account, rather than pay it out in dividends." As already shown, the accumulated cash surplus of the Victor Adding Machine Company was \$400,000 but it does not appear what, if any, cash surplus has been accumulated by Buehler Brothers. Nor does it appear what the net worth of either the Victor Adding Machine Company or Buehler Brothers was. While the aforesaid cash surplus may not be presently expendable toward the payment of alimony to plaintiff it has enriched defendant and his holdings in the two companies show that he is, to say the least, a moderately wealthy man.

Disregarding entirely all the evidence in the record bearing on defendant's wealth and considering only the evidence in respect to his ability to pay plaintiff sufficient alimony to meet her additional needs out of the increase in his income since April 1942, we are impelled to hold that the trial court was warranted in awarding plaintiff a reasonable increase in alimony. We think, however, that the increase of \$275 a month awarded plaintiff by the trial court was somewhat excessive and that under all the facts and circumstances in evidence an increase of \$175 a month in her alimony would fairly meet her additional needs. This would amount to an increase of \$2100 a year. In the high income tax "brackets" that defendant's gross income of \$30,000 a year placed him, he would be relieved of a substantial portion, possibly about one-half, of the burden of said increase by reason of the reduction of his income tax thereon to that extent. On the other hand, if plaintiff's income tax for 1944 would amount to approximately \$500 on her \$2700 alimony, as she testified, it would undoubtedly amount to at least an additional \$400 or \$500 by reason of a \$2100 increase in her alimony. Therefore, in reality defendant would only be burdened with the payment of about one-half of plaintiff's \$2100 increase in alimony, while she would be re-

geons to at some time take a capital gain, where you have a 25% tax on the capital account, rather than pay it out in dividends." As already shown, the accumulated cash surplus of the Victor Adding Machine Company was \$400,000 but it does not appear what, if any, cash surplus has been accumulated by Mueller Brothers. Nor does it appear what the net worth of either the Victor Adding Machine Company or Mueller Brothers was. While the aforesaid cash surplus may not be presently expendable toward the payment of alimony to plaintiff it has enriched defendant and his holdings in the two companies show that he is, to say the least, a moderately wealthy man.

Disregarding entirely all the evidence in the record bearing on defendant's wealth and considering only the evidence in respect to his ability to pay plaintiff sufficient alimony to meet her additional needs out of the increase in his income since April 1942, we are impelled to hold that the trial court was warranted in awarding plaintiff a reasonable increase in alimony. We think, however, that the increase of \$275 a month awarded plaintiff by the trial court was somewhat excessive and that under all the facts and circumstances in evidence an increase of \$175 a month in her alimony would fairly meet her additional needs. This would amount to an increase of \$2100 a year. In the high income tax "bracket" that defendant's gross income of \$30,000 a year placed him, he would be relieved of a substantial portion, possibly about one-half, of the burden of said increase by reason of the reduction of his income tax thereon to that extent. On the other hand, if plaintiff's income tax for 1944 would amount to approximately \$700 on her \$2700 alimony, as she testified, it would undoubtedly amount to at least an additional \$400 or \$500 by reason of a \$2100 increase in her alimony. Therefore, in reality defendant would only be burdened with the payment of about one-half of plaintiff's \$2100 increase in alimony, while she would be re-

quired to pay approximately \$400 or \$500 income tax on such increase. There can be no question of defendant's ability to pay plaintiff an increase in alimony of \$175 a month out of his increased income.

As we have pointed out, defendant was a reluctant and evasive witness, at least as to portions of his testimony, and the trial judge found that his testimony was unreliable and untrustworthy. The chancellor saw and heard him testify and since he was in a much better position than we to observe his conduct and demeanor as a witness and to determine his credibility, we would not be warranted in disturbing his finding in this regard.

We cannot permit to pass unnoticed the groundless attack made in defendant's brief on Judge Schwartz. Although defendant's counsel seek to disavow an intention to assail the integrity of Judge Schwartz, by stating in defendant's brief, "Counsel for respondent have always had, and still have faith in Judge Schwartz's integrity," and in his reply brief, "We repeat that we have faith in Judge Schwartz's integrity," yet defendant's brief is replete with unwarranted charges, which are reaffirmed in his reply brief, that Judge Schwartz was strongly prejudiced against the defendant "before this case was tried," that "he was determined to hear this case personally" and that "he had predetermined the issues before any evidence was heard." Counsel even go so far as to make the following statement in defendant's brief: "The fact is that Goldie Buehler chose the chancellor she thought best suited her desires. The ability of a litigant to choose the judge is an old evil and one which our courts have sought to correct. The judges themselves adopted rules, orders and practices providing for the selection of judges by methods intended to make obsolete the evil whereby litigants choose friendly judges. Judge Schwartz's attitude toward Albert C. Buehler

desired to pay approximately \$400 or \$500 income tax on such increase. There can be no question of defendant's ability to pay plaintiff an increase in alimony of \$175 a month out of his increased income.

As we have pointed out, defendant was a reluctant and evasive witness, at least as to portions of his testimony, and the trial judge found that his testimony was unreliable and untrustworthy. The chancellor saw and heard him testify and since he was in a much better position than we to observe his conduct and demeanor as a witness and to determine his credibility, we would not be warranted in disturbing his finding in this regard.

We cannot permit to pass unnoticed the grounds stated made in defendant's brief on Judge Schwartz's motion. Although defendant's counsel seek to disavow an intention to assail the integrity of Judge Schwartz, by stating in defendant's brief, "Counsel for respondent have always had, and still have faith in Judge Schwartz's integrity," and in his reply brief, "we repeat that we have faith in Judge Schwartz's integrity," yet defendant's brief is replete with unwarranted charges, which are well stated in his reply brief, that Judge Schwartz was strongly prejudiced against the defendant "before this case was tried," that "he was determined to hear this case personally" and that "he had predetermined the issues before any evidence was heard." Counsel even go so far as to make the following statement in defendant's brief: "The fact is that Goldie Schuler chose the chancellor she thought best suited her desires. The ability of a litigant to choose the judge is an old evil and one which our courts have sought to correct. The judges themselves adopted rules, orders and practices providing for the selection of judges by methods intended to make obsolete the evil which litigants choose friendly judges. Judge Schwartz's attitude toward Albert C. Schuler

must have been known or foreseen by Goldie Buehler."

Charges of a similar nature were made against Judge Schwartz by defendant's attorneys in the brief filed by them in his behalf in the last preceding appeal from an order entered by Judge Schwartz and yet they did not file a petition for a change of venue from him in the instant proceeding. If defendant or his attorneys believed that Judge Schwartz was as unfair and prejudiced against defendant in the prior proceeding as his attorneys maintained that he was on the previous appeal, they would not have hesitated for one moment to file a petition for a change of venue from him in the case at bar. But, as will be hereinafter shown, it was not until after the chancellor found at the conclusion of the evidence that "the defendant's testimony was unreliable and untrustworthy" and determined the issues against him that his attorneys must have resolved to level the aforesaid charges against him on this appeal. That defendant's attorneys did not believe such charges to be true when they made them on the prior appeal is demonstrated by their failure to ask for a change of venue in this proceeding and that the foregoing charges made on this appeal have no basis in truth is demonstrated by the record in this case. When Judge Schwartz denied defendant's motion to vacate Judge Graber's order of May 24, 1944 assigning the case to him, the following, among other statements were made by court and counsel:

"JUDGE SCHWARTZ: You have argued this question of erroneous assignment of this case to Calendar No. 2 of the erroneous hearing of the case by me. You haven't questioned my fairness or want of prejudice so far as the case is concerned, so that your motion is just a very technical one, one designed to lay a basis for the ultimate argument that some impropriety in the course of the trial would make any order that I might enter here invalid.

"MR. PETIT [Attorney for defendant]: There is one thing that I do want to say and one thing that I do want to impress on your Honor's mind. I have and everybody in our office has a very sincere respect and great admiration for your Honor's judgment. I am not making these motions because

must have been known or foreseen by Goldie Twelker."

charges of a similar nature were made against Judge

Schwartz by defendant's attorneys in the brief filed by them

in his behalf in the last preceding appeal from an order

entered by Judge Schwartz and yet they did not file a petition

for a change of venue from him in the instant proceeding. If

defendant or his attorneys believed that Judge Schwartz was

as unfair and prejudiced against defendant in the prior pro-

ceeding as his attorneys maintained that he was on the previous

appeal, they would not have hesitated for one moment to file

a petition for a change of venue from him in the case at bar,

But, as will be hereinafter shown, it was not until after the

channeler found at the conclusion of the evidence that "the

defendant's testimony was unreliable and unworthy" and

determined the issues against him that his attorneys must

have resolved to level the atrocious charges against him on

this appeal. That defendant's attorneys did not believe such

charges to be true when they made them on the prior appeal is

demonstrated by their failure to ask for a change of venue in

this proceeding and that the foregoing charges made on this

appeal have no basis in truth is demonstrated by the record in

this case. When Judge Schwartz denied defendant's motion to

vacate Judge Graber's order of May 24, 1944 assigning the case

to him, the following, among other statements were made by

court and counsel:

JUDGE SCHWARTZ: You have argued this question of erroneous assignment of this case to Graber. No. 2 of the erroneous hearing of the case by me. You haven't questioned my fairness or want of prejudice so far as the case is concerned, so that your motion is just a very technical one, one designed to lay a basis for the ultimate argument that some irregularity in the course of the trial would make any order that I might enter here invalid.

MR. WITTE [Attorney for defendant]: There is one thing that I do want to say and one thing that I do want to express on your Honor's mind. I have and everybody in our office has a very sincere respect and great admiration for your Honor's judgment. I am not making these motions because

of resentment but merely because of the fact that we feel under the rules that this matter should have been brought by Mr. May before Judge Sbarboro in the first place following the rules of the court.

"JUDGE SCHWARTZ: Why is it material whether he hears the case or whether I hear the case? If all that you say about my judgment is true or only half true, is it material whether he hears the case or I hear the case? Is there any material error? Is there any error that it is prejudicial to you when you say you have an unprejudiced judge?"

The conduct of defendant's counsel in making and repeating unwarranted charges of the kind and character heretofore set forth against an upright chancellor of proven integrity is deserving of censure.

For the reasons stated herein the decretal order of the Superior court is affirmed in all respects except as to the amount of the increase in alimony awarded to plaintiff and as to such amount it is reversed and the cause remanded with directions that the order be modified so as to award plaintiff an increase in her alimony of \$175 a month from May 3, 1944, the date on which she filed her petition for an increase in her alimony.

AFFIRMED IN PART, REVERSED IN
PART, AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

[illegible]

The conduct of defendant's counsel in this matter, at least, is reprehensible to faultless extent.

to the fact that the...

Therefore set forth an upright character of

Proven integrity is a matter of course.

For the reasons stated herein the Court order of the Superior Court is affirmed in all respects except as to the amount of the increase in library charges to plaintiffs and as to such amount it is reversed and the cause remanded with directions that the order be modified so as to award plaintiffs an increase in her library of \$17.50 month from May, 1944, the date on which she filed her petition for an increase in her library charges.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED
DATE 11-11-2009 BY 60322 UCBAW

11 June 1947

43282

329 I.A. 240

MARGARET PANELLA,
Appellee,

v.

WEIL-McLAIN COMPANY, a
corporation, and PHILLIP
DOMKE,
Appellants.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Margaret Panella sued Weil-McLain Company, a corporation, and Phillip Domke to recover damages for injuries she sustained in an accident. A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$12,000. Defendants appeal from a judgment entered upon the verdict.

A careful study of the record satisfies us that this case was well tried. Many of the points usually assigned in personal injuries cases are not urged by defendants. No point is made as to the pleadings; no contention is made that the verdict is against the manifest weight of the evidence, nor that the damages ~~xxx~~ awarded are excessive. There is no complaint of any misconduct upon the part of the trial court or the opposing counsel. The following are the sole errors relied upon for a reversal: "(1) The plaintiff was guilty of contributory negligence as a matter of law and as a matter of fact. (2) There was no proof that the defendants were negligent. (3) The court erred in giving plaintiff's given instruction number 1. (4) The court erred in refusing to admit certain evidence of the defendants." In support of point (1) defendants contend that there was no proof of due care on the part of plaintiff and therefore the trial court erred in refusing to instruct the jury to find for the defendants at the close of all the evidence.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule

329 I.A. 240

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MARGARET PAMELLA, Appellee, v. WEIL-MOLAIN COMPANY, a corporation, and PHILLIP DOMKE, Appellants.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Margaret Pamela sued Weil-Molain Company, a corporation, and Phillip Domke to recover damages for injuries she sustained in an accident. A jury returned a verdict finding defendants guilty and assessing plaintiff's damages at \$12,000. Defendants appeal from a judgment entered upon the verdict.

A careful study of the record satisfies us that this case was well tried. Many of the points usually assigned in personal injuries cases are not urged by defendants. No point is made as to the pleadings; no contention is made that the verdict is against the manifest weight of the evidence, nor that the damages awarded are excessive. There is no complaint of any misconduct upon the part of the trial court or the opposing counsel. The following are the sole errors relied upon for reversal: (1) The plaintiff was guilty of contributory negligence as a matter of law and as a matter of fact. (2) There was no proof that the defendants were negligent. (3) The court erred in giving plaintiff's given instruction number 1. (4) The court erred in refusing to admit certain evidence of the defendants. In support of point (1) defendants contend that there was no proof of due care on the part of plaintiff and therefore the trial court erred in refusing to instruct the jury to find for the defendants at the close of all the evidence. "A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule

is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296-7.)" (Rose v. City of Chicago, 317 Ill. App. 1, 12. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Olympia Fields Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 656.)

Plaintiff had the right to prove her case by direct or circumstantial evidence. In criminal as well as in civil cases a verdict may be founded on circumstances alone. See Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, 5, 6 (appeal denied by Supreme court, id. xiv), and cases cited therein. See, also, Gardner v. Railway Express Agency, 274 Ill. App. 626, 631. The question of contributory negligence is one preeminently for the consideration of a jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. (Blumb v. Getz, 366 Ill. 273, 277; Moran v. Gatz, 390 Ill. 478, 486.) As defendants introduced evidence after the trial court had denied their motion for a directed verdict at the close of plaintiff's case, she has the right to rely upon any evidence

of plaintiff's case, she has the right to rely upon any evidence court had denied their motion for a directed verdict at the close 478, 486.) As defendants introduced evidence after the trial jury. (Blump v. Getz, 366 Ill. 273, 277; Moran v. Gate, 350 Ill. province of the court to substitute its judgment for that of the person is clearly and palpably negligent, it is not within the in exact terms, and unless it can be said that the action of a the consideration of a jury, as such negligence cannot be defined The question of contributory negligence is one preeminently for also, Gardner v. Railway Express Agency, 274 Ill. App. 626, 631. denied by Supreme court, 14, xiv), and cases cited therein. See, v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, 5, 6 (appeal a verdict may be founded on circumstances alone. See Horkevich circumstantial evidence. In criminal as well as in civil cases Plaintiff had the right to prove her case by direct or 649, 656.)

Olympia Fields Club v. Bankers Indem. Ins. Co., 325 Ill. App. 104, 110; Molaver v. Curtiss Candy Co., 293 Ill. App. 586, 597; 493, 497; Thompson v. Chicago Motor Coach Co., 292 Ill. App. 111. App. 1, 12. See, also, Wahen v. Richardson, 284 Ill. App. v. Town, 315 Ill. 293, 296-7.)" (Rose v. City of Chicago, 317 v. Reynolds, 288 14, 188; Lloyd v. Bush, 273 14, 489; (Hunter is favorable to appellant. Yess v. Yess, 257 Ill. 414; McGwine we do not weigh the evidence, - we can look only at that which reviewing the action of the court of which complaint is made

evidence or explanatory circumstances must be rejected. The evidence fairly tending to prove the plaintiff's declaration. In question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In plaintiff. The evidence is not weighed, and all contradictory arising therefrom, must be taken most strongly in favor of the able to the plaintiff, together with all reasonable inferences is that the evidence so demurred to, in its aspect most favor-

offered by defendants that favors her theory of fact. In his argument, counsel for defendants has not adhered to the rules that govern our consideration of point (1). Instead of making a complete, impartial statement of plaintiff's evidence he takes excerpts from the evidence which he considers favorable to defendants' contention, and draws conclusions therefrom, thereby ignoring the fundamental rule that we must consider only that evidence which is favorable to plaintiff. Sometimes, by inadvertence, counsel misstates the evidence.

The accident happened on August 26, 1942, about three o'clock p.m. It was a "warm and sunshiny day." Hamilton avenue, a north and south street, intersects Taylor street, an east and west street, at the point of the accident. Ogden avenue runs northeast and southwest and it intersects Taylor street about 100 feet west of Hamilton avenue. There are eastbound and westbound street cars on Taylor street. Plaintiff's theory of fact was that she was a passenger on a westbound Taylor street car which stopped at the northeast corner of Ogden avenue and Taylor street and that its rear platform then extended east into the intersection of Taylor street with Hamilton avenue; that after alighting from the rear platform plaintiff, who intended to travel south on Hamilton avenue, walked some three or four steps, about eight or twelve feet, east of the rear of the street car, and then turned south and walked to a point between the eastbound and westbound tracks, where she stopped and looked in both directions; that there was no traffic approaching and the traffic lights at Ogden avenue were red for east and west traffic; that the point from which plaintiff looked was about nineteen feet from the south curb of Taylor street; that the truck of Weil-McLain Company, defendant, which had been traveling in a northeasterly direction on Ogden avenue, had not then turned the corner into Taylor street, so that at the time she looked west on Taylor street

offered by defendants that favors her theory of fact. In his argument, counsel for defendants has not adhered to the rules that govern our consideration of point (1). Instead of making a complete, impartial statement of plaintiff's evidence he takes excerpts from the evidence which he considers favorable to defendants' contention, and draws conclusions therefrom, thereby ignoring the fundamental rule that we must consider only that evidence which is favorable to plaintiff. Sometimes, by inadvertence, counsel misstates the evidence.

The accident happened on August 26, 1942, about three o'clock p.m. It was a "warm and sunny day." Hamilton avenue, a north and south street, intersects Taylor street, an east and west street, at the point of the accident. Ogden avenue runs northeast and southwest and it intersects Taylor street about 100 feet west of Hamilton avenue. There are eastbound and westbound street cars on Taylor street. Plaintiff's theory of fact was that she was a passenger on a westbound Taylor street car which stopped at the northeast corner of Ogden avenue and Taylor street and that the rear platform then extended east into the intersection of Taylor street with Hamilton avenue; that after alighting from the rear platform plaintiff, who intended to travel south on Hamilton avenue, walked some three or four steps, about eight or twelve feet, east of the rear of the street car, and then turned south and walked to a point between the eastbound and westbound tracks, where she stopped and looked in both directions; that there was no traffic approaching and the traffic lights at Ogden avenue were red for east and west traffic; that the point from which plaintiff looked was about nineteen feet from the south curb of Taylor street; that the truck of Well-McNair Company, defendant, which had been traveling in a northeasterly direction on Ogden avenue, had not then turned the corner into Taylor street, so that at the time she looked west on Taylor street

she did not see the truck; that there was nothing between her and the southwest corner of Taylor street and Hamilton avenue; that she then walked slowly and on an angle to that corner, which was approximately twenty-five feet from the point where she had stopped and looked; that about that time the truck, driven by Phillip Domke, defendant, made a right turn into Taylor street, and the truck, proceeding eastward on that street, struck plaintiff when she had reached a point three or four steps from the southwest corner of Taylor and Hamilton, ran over her and caused serious and permanent injuries; that plaintiff, after she alighted from the car, walked three or four steps east from the rear of the standing street car, so that she might be able to see beyond the street car, and that she might be seen by traffic moving eastward on Taylor street. There is evidence that supports plaintiff's theory of fact. Defendants argue that the proof shows conclusively that plaintiff, when she emerged from behind the street car, failed to look to the west before she started to walk toward the southwest corner of Taylor street and Hamilton avenue; that "the plaintiff said she looked and did not see the truck which was in plain sight - and thus admits failing to look"; that "when this plaintiff, having an unobstructed view to the west as far as the stop lights on the corner of Ogden and Taylor, as she says, looked and did not see that which was present, there is only one meaning at law, that she never looked." Counsel takes excerpts from the testimony of certain witnesses and insists that they show conclusively that when plaintiff emerged from behind the street car the truck was fully visible to her had she looked. If the question before us related to the weight of the evidence the labored argument of counsel might have some point. It seems plain to us that the jury might have reasonably inferred from certain facts and circumstances in evidence that at the time

she did not see the truck; that there was nothing between her and the southwest corner of Taylor street and Hamilton avenue; that she then walked slowly and on an angle to that corner, which was approximately twenty-five feet from the point where she had stopped and looked; that about that time the truck, driven by Phillip Domeke, defendant, made a right turn into Taylor street, and the truck, proceeding eastward on that street, struck plaintiff when she had reached a point three or four steps from the southwest corner of Taylor and Hamilton, ran over her and caused serious and permanent injuries; that plaintiff, after she alighted from the car, walked three or four steps east from the rear of the standing street car, so that she might be able to see beyond the street car, and that she might be seen by traffic moving eastward on Taylor street. There is evidence that supports plaintiff's theory of fact. Defendants argue that the proof shows conclusively that plaintiff, when she emerged from behind the street car, failed to look to the west before she started to walk toward the southwest corner of Taylor street and Hamilton avenue; that "the plaintiff said she looked and did not see the truck which was in plain sight - and thus admits failing to look"; that "when this plaintiff, having an unobstructed view to the west as far as the stop lights on the corner of Ogden and Taylor, as she says, looked and did not see that which was present, there is only one meaning at law, that she never looked." Counsel takes excerpts from the testimony of certain witnesses and insists that they show conclusively that when plaintiff emerged from behind the street car the truck was fully visible to her and she looked. If the question before us related to the weight of the evidence the labored argument of counsel might have some point. It seems plain to us that the jury might have reasonably inferred from certain facts and circumstances in evidence that at the time

plaintiff stopped to look the truck had not yet turned into Taylor street and that while plaintiff slowly walked from the point where she had looked to the point of impact the truck had turned the corner and proceeded east on Taylor street to the point of impact. Plaintiff testified that she walked slowly. Defendant, Domke, the driver of the truck, was very familiar with the intersection, and he stated that he made the turn into Taylor street at eight miles per hour and that when he turned the corner he increased his speed until he was traveling fourteen miles per hour. There are circumstances in evidence that warrant a reasonable inference that the speed of the truck as it reached the point of impact was greater than fourteen miles per hour. We will refer later to these circumstances. Domke admitted that from the time he rounded the corner until the accident he did not blow his horn. Defendants' argument that certain evidence of plaintiff's witnesses shows conclusively that the truck had almost reached the rear of the street car when plaintiff emerged from behind the car is not supported by the record. Moreover, the argument bears upon the weight of the evidence, a question not raised upon this appeal. None of plaintiff's witnesses testified to the movements of plaintiff before the impact. Wingblade, the conductor on the street car in question, testified that when he first saw plaintiff "she was in front of the truck around by the crosswalk of Hamilton" street; that the truck was then about eight or ten feet away from her; that he did not see where plaintiff came from. The only witness for plaintiff that testified as to the route she traveled from the time she alighted from the street car until the moment of impact was the plaintiff. Defendants state: "The most recent case involving this proposition of looking and not seeing is Moran v. Gatz, 324 Ill. App. 76 [45]. There the plaintiff, a pedestrian, was crossing an east and west street on a crosswalk from north to

plaintiff stopped to look the truck had not yet turned into Taylor street and that while plaintiff slowly walked from the point where she had looked to the point of impact the truck had turned the corner and proceeded east on Taylor street to the point of impact. Plaintiff testified that she walked slowly. Defendant, Dome, the driver of the truck, was very familiar with the intersection, and he stated that he made the turn into Taylor street at eight miles per hour and that when he turned the corner he increased his speed until he was traveling fourteen miles per hour. There are circumstances in evidence that warrant a reasonable inference that the speed of the truck as it reached the point of impact was greater than fourteen miles per hour. We will refer later to these circumstances. Dome admitted that from the time he rounded the corner until the accident he did not blow his horn. Defendant's argument that certain evidence of plaintiff's witnesses shows conclusively that the truck had almost reached the rear of the street car when plaintiff emerged from behind the car is not supported by the record. Moreover, the argument bears upon the weight of the evidence, a question not raised upon this appeal. None of plaintiff's witnesses testified to the movements of plaintiff before the impact. Plaintiff, the conductor on the street car in question, testified that when he first saw plaintiff "she was in front of the truck around by the crosswalk of Hamilton" street; that the truck was then about eight or ten feet away from her; that he did not see where plaintiff came from. The only witness for plaintiff that testified as to the route she traveled from the time she alighted from the street car until the moment of impact was the plaintiff. Defendant states: "The most recent case involving this proposition of looking and not seeing is *Norman v. Galt*, 324 Ill. App. 76 [42]. There the plaintiff, a pedestrian, was crossing an east and west street on a crosswalk from north to

south when she was struck by defendant's eastbound car. The plaintiff looked the first time before she left the curb and saw some cars about a block away, and when she was three or four feet north of the westbound car track she 'partially looked' but did not see the defendant's car. She was held guilty of contributory negligence." Defendants insist that the Moran case applies to the instant proceeding upon the facts. In that case the pedestrian after looking for approaching traffic proceeded across the crosswalk, "partially" looked again, saw nothing, and continued on and was struck when she had almost reached a place of safety. The Appellate court held that, under the facts, the plaintiff in the Moran case was guilty of contributory negligence as a matter of law, but the Supreme court (Moran v. Gatz, 390 Ill. 478), after an exhaustive review of authorities from other States, reversed the ruling of the Appellate court, and stated (pp. 485, 486):

"The generally accepted rule is that while a statute such as ours gives pedestrians the right of way, it does not confer upon them an advantage which necessarily absolves them from guilt of contributory negligence. Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Blumb v. Getz, 366 Ill. 273.) Whether failure to look was shown and constituted, in this case, want of due care, was an issue of fact for the jury. Morrison v. Flowers, 308 Ill. 189.

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again

south when she was struck by defendant's eastbound car. The plaintiff looked the first time before she left the curb and saw some cars about a block away, and when she was three or four feet north of the westbound car track she 'partially looked' but did not see the defendant's car. He was held guilty of contributory negligence. "Defendants insist that the Nolan case applies to the instant proceeding upon the facts. In that case the pedestrian after looking for approaching traffic proceeded across the crosswalk, "partially" looked again, saw nothing, and continued on and was struck when she had almost reached a place of safety. The appellate court held that under the facts, the plaintiff in the Nolan case was guilty of contributory negligence as a matter of law, but the supreme court (Nolan v. Gatz, 300 Ill. 473), after an extensive review of authorities from other states, reversed the ruling of the appellate court, and stated (pp. 485, 486):

"The generally accepted rule is that while a statute such as ours gives pedestrians the right of way, it does not confer upon them an advantage which necessarily absolves them from guilt of contributory negligence. Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Blum v. Gatz, 306 Ill. 273.) Neither failure to look as shown and constituted, in this case, want of due care, was an issue of fact for the jury. Worison v. Flowers, 308 Ill. 189.

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again

after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety.

Long Transportation Co. v. Domurat, 93 Fed. 2d. 23; Young v. Tassop, 47 Cal. App. 2d 557, 118 Pac. 2d 371; Lawler v. Gaylor, 233 Iowa, 834, 10 N. W. 531; Chevalley v. Degan, (Ohio App. 1943,) 52 N. E. 2d. 544; Reir v. Hart, 202 Minn. 154, 277 N. W. 405."

In the case of Blumb v. Getz, 366 Ill. 273, the decedent, in broad daylight, walked into a traffic lane of a State highway and stooped to recover a glove which he had dropped. While in this position he was struck by defendant's automobile. There the defendant strenuously contended that under such a state of facts the plaintiff was guilty of contributory negligence as a matter of law. This contention was not sustained, the court observing (p. 277): "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." We are satisfied that we would be usurping the functions of the jury if we were to hold that plaintiff was guilty of contributory negligence as a matter of law.

As to point (2), that there was no proof that defendants were negligent: It is difficult to believe that this contention is seriously made. There is merit in plaintiff's statement that certain parts of the testimony of the driver, Domke, make out a prima facie case of gross negligence on his

after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety.

Iowa Transportation Co. v. Bennett, 93 Fed. 2d 23; Young v. Tassop, 47 Cal. App. 2d 577, 118 Pac. 2d 371; Jawley v. Gaylor, 233 Iowa, 314, 10 N. W. 231; Chevalier v. Logan, (Ohio App. 1943) 52 N. E. 2d 744; Hein v. Hart, 302 Minn. 174, 277 N. W. 407.

In the case of Blump v. Gatz, 366 Ill. 273, the decedent, in broad daylight, walked into a traffic lane of a state highway and stooped to recover a glove which he had dropped. While in this position he was struck by defendant's automobile. There the defendant strenuously contended that under such a state of facts the plaintiff was guilty of contributory negligence as a matter of law. This contention was not sustained, the court observing (p. 277): "The question of contributory negligence is one which is preeminently a fact for the consideration of a jury. It can not be defined in exact terms and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of a jury which is provided for the purpose of deciding this as well as the other questions in the case." We are satisfied that we would be usurping the functions of the jury if we were to hold that plaintiff was guilty of contributory negligence as a matter of law.

As to point (2), that there was no proof that defendant were negligent: It is difficult to believe that this contention is seriously made. There is merit in plaintiff's statement that certain parts of the testimony of the driver, Dennis, make out a prima facie case of gross negligence on his

part. He testified that he was familiar with the intersection as he had passed there many times before the day of the accident; that when he approached the intersection of Ogden avenue and Taylor street he slowed down to about eight miles an hour and made a righthand turn, that as he did so he saw a westbound street car standing at the Ogden avenue traffic signal on the northeast corner; that the street car was still standing in that position when the accident happened; that as he proceeded east in Taylor street he accelerated the speed of the truck; that he was picking up speed from the time he made the turn until the time of the accident, when he was going about twelve to fourteen miles an hour; that there were no automobiles parked along the street; that he knew that people alighted from street cars that stopped at the point where the street car in question was standing and that they crossed the street there "but they look where they are going"; that he saw about four people on the rear platform of the street car after the accident; that he did not blow his horn at any time after he rounded the corner; that the reason he did not blow his horn as he approached the corner in question was that he thought that "the passengers were all off already. I was looking ahead"; that when he increased the speed of the truck he "was looking straight ahead." Domke further testified that his brakes were in perfect condition and that when he was going eight miles an hour he could stop the truck, in an emergency, in about five feet; that when he was going fourteen miles an hour he could stop the truck, in an emergency, in about ten feet; that he "jammed on the brakes" when plaintiff was about two feet in front of him. There was testimony that after the accident the truck traveled to a point thirty feet east of the east curb of Hamilton avenue before it stopped and the jury were fully warranted in finding that the truck must have been going more than fourteen miles per hour at the time of the accident. Wingblade testified that when he first saw

part. He testified that he was familiar with the intersection as he had passed there many times before the day of the accident; that when he approached the intersection of Ogden Avenue and Taylor Street he slowed down to about eight miles an hour and made a right-hand turn, that as he did so he saw a westbound street car standing at the Ogden Avenue traffic signal on the northeast corner; that the street car was still standing in that position when the accident happened; that as he proceeded east in Taylor Street he accelerated the speed of the truck; that he was picking up speed from the time he made the turn until the time of the accident, when he was going about twelve to fourteen miles an hour; that there were no automobiles parked along the street; that he knew that people alighted from street cars that stopped at the point where the street car in question was standing and that they crossed the street there "but they look where they are going"; that he saw about four people on the rear platform of the street car after the accident; that he did not blow his horn at any time after he rounded the corner; that the reason he did not blow his horn as he approached the corner in question was that he thought that "the passengers were all off already. I was looking ahead"; that when he increased the speed of the truck he "was looking straight ahead." Dornie further testified that his brakes were in perfect condition and that when he was going eight miles an hour he could stop the truck, in an emergency, in about five feet; that when he was going fourteen miles an hour he could stop the truck, in an emergency, in about ten feet; that he "jammed on the brakes" when plaintiff was about two feet in front of him. There was testimony that after the accident the truck traveled to a point thirty feet east of the east curb of Hamilton Avenue before it stopped and the jury were fully warranted in finding that the truck must have been going more than fourteen miles per hour at the time of the accident. Windblade testified that when he first saw

plaintiff she was standing about at the west crosswalk of Hamilton avenue; that "she was standing in front of the truck with her hands in the air and hollered"; that the truck was then about eight or ten feet away from her; that when he first saw the truck it was going about twenty miles an hour; that the right front wheels and the rear wheel ran over plaintiff. The jury would have been justified in finding from the testimony of Donke that he was grossly negligent, to say the least, in increasing the speed of the truck as he approached the intersection and the standing street car, especially in view of his admission that he gave no warning of his approach.

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact. (Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., ante, p. 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence.' (Petro v. Hines, 299 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 353 Ill. 312, 322, 323.)" (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110.)

Defendants complain that the court committed reversible error in giving to the jury plaintiff's instruction ^{numbered} one. This instruction is not a mandatory one. It contains a verbatim

plaintiff she was standing about at the west crosswalk of Hamilton avenue; that "she was standing in front of the truck with her hands in the air and hollered"; that the truck was then about eight or ten feet away from her; that when he first saw the truck it was going about twenty miles an hour; that the right front wheels and the rear wheel ran over plaintiff. He jury would have been justified in finding from the testimony of some that he was grossly negligent, to say the least, in increasing the speed of the truck as he approached the intersection and the standing street car, especially in view of his admission that he gave no warning of his approach.

"The general rule is that negligence and contributory negligence are questions of fact for the jury, and so long as a question remains whether either party has performed his legal duty or has observed that degree of care and caution imposed upon him by law, and the determination of the question involves the weighing and consideration of evidence, the question must be submitted as one of fact." (Chicago, St. Louis and Pittsburg Railroad Co. v. Hutchinson, 120 Ill. 587; Austin v. Public Service Co., 112 Ill. 2d 112.) Before we can say, as a matter of law, that there was no negligence on the part of the defendant or that there was such contributory negligence on the part of the plaintiff as to defeat recovery, we must be able to say that all reasonable minds must agree that the defendant was not negligent in his acts or that the injury was the result of plaintiff's own negligence." (Petrie v. Kansas, 229 Ill. 236, 240. See, also, Pollard v. Broadway Central Hotel Corp., 373 Ill. 512, 322, 323.) (The Mason v. Chicago Motor Coach Co., 292 Ill. 444, 104, 110.)

Defendants complain that the court committed reversible error in giving to the jury plaintiff's instruction one. This instruction is not a mandatory one. It contains a verbatim

statement of a part of the statute which states the law that is applicable where a pedestrian is crossing the street in a crosswalk, and also the part of the statute which is applicable where a pedestrian is crossing a roadway at any point other than that within a marked crosswalk or within an unmarked crosswalk at an intersection. The argument of defendants that the instruction "in effect told the jury that plaintiff had the absolute right of way over defendants' vehicle" is without merit. We think that the instruction was fair to both sides. As it was in the language of the statute the giving of the same did not constitute error. See Minnis v. Friend, 360 Ill. 328, 338; Howard v. Baltimore & Ohio Chicago Terminal R. Co., 327 Ill. App. 83, 95. (Leave to appeal denied by the Supreme court.) But defendants contend that there was no evidence to support a theory of fact that plaintiff was in the crosswalk at the time of the accident. It is the law that a crosswalk need not be painted or marked on the surface of the street to constitute a statutory crosswalk, but at any intersection the extensions of sidewalk lines over the streets are regarded as crosswalks. (Ch. 95 1/2, Par. 111, Ill. Rev. Stat.) The mere fact that Domke testified that there was no crosswalk there has no probative value in view of the actual situation at the place of the accident and the law that bears upon the same. Defendants further contend that there is no evidence to show that plaintiff was upon a crosswalk at the time of the impact. The jury might reasonably have found from the testimony of plaintiff that she was within the crosswalk when the impact occurred. Wingblade definitely stated that she was "around by the crosswalk" and "at about the west crosswalk." Counsel for defendants argues that upon cross-examination he caused the witness to change this testimony, but that fact, if it be a fact, would not deprive plaintiff of the right to have the instruction given. Defendants asked the court to give fifteen instructions and all of them were given. Some

statement of a part of the statute which states the law that is applicable where a pedestrian is crossing the street in a crosswalk, and also the part of the statute which is applicable where a pedestrian is crossing a roadway at any point other than that within a marked crosswalk or within an unmarked crosswalk at an intersection. The argument of defendants that the instruction "in effect told the jury that plaintiff had the absolute right of way over defendants' vehicle" is without merit. We think that the instruction was fair to both sides. As it was in the language of the statute the giving of the same did not constitute error. See Minnis v. Friend, 300 Ill. 328, 338; Howard v. Baltimore & Ohio Chicago Terminal R. Co., 327 Ill. App. 83, 95. (Leave to appeal denied by the Supreme Court.) But defendants contend that there was no evidence to support a theory of fact that plaintiff was in the crosswalk at the time of the accident. It is the law that a crosswalk need not be painted or marked on the surface of the street to constitute a statutory crosswalk, but at any intersection the extensions of sidewalk lines over the streets are regarded as crosswalks. (Ch. 95 1/2, Par. 111, Ill. Rev. Stat.) The mere fact that Bomke testified that there was no crosswalk there has no probative value in view of the actual situation at the place of the accident and the law that bears upon the same. Defendants further contend that there is no evidence to show that plaintiff was upon a crosswalk at the time of the impact. The jury might reasonably have found from the testimony of plaintiff that she was within the crosswalk when the impact occurred. "Inglade definitely stated that she was 'struck by the crosswalk' and 'at about the west crosswalk.'" Counsel for defendants argues that upon cross-examination he caused the witness to change this testimony, but that fact, if it be a fact, would not deprive plaintiff of the right to have the instruction given. Defendants asked the court to give fifteen instructions and all of them were given. Some

of the instructions are lengthy, and four were mandatory instructions. Certain principles of law that favored defendants were stated in several of the mandatory instructions. Strangely enough, two of the mandatory instructions are exact duplicates. A reading of all of the instructions given convinces us that the rights of defendants were fully protected.

Defendants contend that the trial court erred in giving to the jury plaintiff's instruction numbered 2. The instruction reads as follows: "The Court instructs the jury that the law in this State does not regulate a precise speed in miles per hour at which a motor vehicle must at any given time or place be run, but the law only states that such rate of speed must be no greater than is reasonable and proper, having regard to the traffic and the use made of the way, or so as to endanger the life or limb or property of any person, and leaves it to the jury to say under all the circumstances surrounding any given case whether or not the truck in question was being propelled at a speed that is reasonable and proper, having regard to the traffic and the use made of the way, or so as not to endanger the life or limb or property of any person." The sole objection made to the instruction is "that there was no evidence of speed on the part of the defendants," and the argument in support of the objection is limited to the statement that the giving of the instruction might cause the jury to believe that there was evidence of undue speed. We have already stated that the jury would have been warranted from the facts and circumstances in evidence in finding that at the time of the impact the truck was being driven at a greater rate of speed than fourteen miles per hour; indeed, Wingblade testified that the speed at the said time was about twenty miles per hour. There is evidence that after the brakes were applied the truck traveled across most of Hamilton avenue, which was thirty-six feet wide, and to a point forty feet east of the east curb of that street

of the instructions are lengthy, and four were mandatory instructions. Certain principles of law that favored defendants were stated in several of the mandatory instructions. Strangely enough, two of the mandatory instructions are exact duplicates. A reading of all of the instructions given convinces us that the rights of defendants were fully protected.

Defendants contend that the trial court erred in giving to the jury plaintiff's instruction numbered 2. The instruction reads as follows: "The Court instructs the jury that the law in this State does not regulate a precise speed in miles per hour at which a motor vehicle must at any given time or place be run, but the law only states that such rate of speed must be no greater than is reasonable and proper, having regard to the traffic and the use made of the way, or so as to endanger the life or limb or property of any person, and leaves it to the jury to say under all the circumstances surrounding any given case whether or not the truck in question was being propelled at a speed that is reasonable and proper, having regard to the traffic and the use made of the way, or so as not to endanger the life or limb or property of any person." The sole objection made to the instruction is "that there was no evidence of speed on the part of the defendants," and the argument in support of the objection is limited to the statement that the giving of the instruction might cause the jury to believe that there was evidence of undue speed. We have already stated that the jury would have been warranted from the facts and circumstances in evidence in finding that at the time of the impact the truck was being driven at a greater rate of speed than fourteen miles per hour; indeed, inglade testified that the speed at the said time was about twenty miles per hour. There is evidence that after the brakes were applied the truck traveled across most of Hamilton avenue, which was thirty-six feet wide, and to a point forty feet east of the east curb of that street

before it stopped. In a long line of cases it has been held that the question as to whether a defendant was traveling at a speed that was reasonable and proper, having regard to the traffic and the use made of the way, depends upon the circumstances of each case and ordinarily constitutes a jury question. Under certain circumstances a high rate of speed might not be negligence and under other circumstances a comparatively low rate of speed may be gross negligence. In Hartwig v. Knapwurst, 178 Ill. App. 409, 411, the defendant contended that he was only going at the rate of six or eight miles an hour at the time of the accident, but Mr. Justice Barnes said: "It was a question of fact for the jury, whose decision we are not disposed to disturb, whether the speed, though not great, was not dangerous under the circumstances of the time and place."

The last contention of defendants is that the court erred in refusing to admit certain evidence offered by them. It appears that the witness Wingblade made a "Conductor's Report" and "Conductor's Statement" to his company on August 26, 1942. Defendants offered in evidence the entire "Report" and "Statement" and the court allowed them to read to the jury the entire "Conductor's Report" and "Conductor's Statement" save question 6 and the answer thereto that were contained in the "Conductor's Report." The said question and answer read as follows: "6. SOMETHING CAUSED this accident. What was it? It seem like she stepped in front of truck." The "Conductor's Statement" as to the accident reads as follows: "Sheffield Taylor West Bound at Taylor and Ogden standing waiting for light - a Truck License No. D. truck 1258-42 Ill. West Bound at Hamilton ran over a woman I did not see where she came from first I saw her laying in front of front wheels so both front wheels and rear wheels ran over her body I went over & helped driver and some other men carry her to an automobile which took her to Hospital Our car was not involved in any way." Counsel

-12-

before it stopped. In a long line of cases it has been held that the question as to whether a defendant was traveling at a speed that was reasonable and proper, having regard to the traffic and the use made of the way, depends upon the circumstances of each case and ordinarily constitutes a jury question. Under certain circumstances a high rate of speed might not be negligence and under other circumstances a comparatively low rate of speed may be gross negligence. In Hartman v. International, 128 Ill. App. 409, 411, the defendant contended that he was only going at the rate of six or eight miles an hour at the time of the accident, but Mr. Justice Barnes said: "It was a question of fact for the jury, whose decision we are not disposed to disturb, whether the speed, though not great, was not dangerous under the circumstances of the time and place."

The last contention of defendants is that the court erred in refusing to admit certain evidence offered by them. It appears that the witness Windblade made a "Conductor's Report" and "Conductor's Statement" to his company on August 26, 1942. Defendants offered in evidence the entire "Report" and "Statement" and the court allowed them to read to the jury the entire "Conductor's Report" and "Conductor's Statement" save question 6 and the answer thereto that were contained in the "Conductor's Report." The said question and answer read as follows: "Q. SO TRUCK CRASHED THIS ACCIDENT. WHAT WAS IT? IT SEEM LIKE SHE STOPPED IN FRONT OF TRUCK." The "Conductor's Statement" as to the accident reads as follows: "Sherfield Taylor West found at Taylor and Ogden standing waiting for light - a Truck License No. D. Truck 1250-42 Ill. West found at Hamilton ran over a woman I did not see where she came from that I saw her laying in front of front wheels so both front wheels and rear wheels ran over her body I went over & helped driver and some other men carry her to an automobile which took her to Hospital Our car was not involved in any way." Counsel

for plaintiff objected to the admission of question and answer numbered 6, upon the ground that the question called for a conclusion of the witness and the answer was not a statement of fact based on the witness's own knowledge of what had occurred. The court sustained the objection. Defendants contend that they had a right to impeach the testimony of Wingblade and that his answer to question 6 would impeach him. The question did not ask the witness to state what he saw. It calls upon him to state his opinion as to what caused the accident, regardless of how he reached that opinion. The answer of the witness does not purport to be a statement of what he saw, but when we reach that part of the printed form headed "Conductor's Statement" the form calls upon the witness to "State clearly how the accident happened and what took place, and give any other information you can about this occurrence," and in answering this question Wingblade states that he "did not see where she came from first I saw her laying in front of front wheels so both front wheels and rear wheels ran over her body." Furthermore, in his direct examination and cross-examination upon the trial Wingblade stated that when he first saw plaintiff she was standing in front of the truck with her hands in the air and hollered. It is a fundamental rule of law that a witness must testify to facts and not to his opinions, unless the case is one where opinion evidence is material. We think that the ruling of the trial court in refusing to allow defendants to read question and answer numbered 6 was proper. We might add that defendants make no claim that the verdict is against the manifest weight of the evidence, and, therefore, the argument that the answer to question 6 would tend to affect the credibility of the witness Wingblade is without force.

Defendants have had a fair trial and the judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

for plaintiff objected to the admission of question and answer numbered 6, upon the ground that the question called for a conclusion of the witness and the answer was not a statement of fact based on the witness's own knowledge of what had occurred. The court sustained the objection. Defendants contend that they had a right to impeach the testimony of Wingblade and that his answer to question 6 would impeach him. The question did not ask the witness to state what he saw. It calls upon him to state his opinion as to what caused the accident, regardless of how he reached that opinion. The answer of the witness does not purport to be a statement of what he saw, but when we reach that part of the printed form headed "Conductor's Statement" the form calls upon the witness to "state clearly how the accident happened and what took place, and give any other information you can about this occurrence," and in answering this question Wingblade states that he "did not see where she came from first I saw her laying in front of front wheels so both front wheels and rear wheels ran over her body." Furthermore, in his direct examination and cross-examination upon the trial Wingblade stated that when he first saw plaintiff she was standing in front of the truck with her hands in the air and hollered. It is a fundamental rule of law that a witness must testify to facts and not to his opinions, unless the case is one where opinion evidence is material. To think that the ruling of the trial court in refusing to allow defendants to read question and answer numbered 6 was proper, we might add that defendants make no claim that the verdict is against the manifest weight of the evidence, and, therefore, the argument that the answer to question 6 would tend to affect the credibility of the witness Wingblade is without force.

Defendants have had a fair trial and the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

43522

V.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

Defendant's motion to strike and dismiss the amended complaint was sustained and an order was entered dismissing plaintiff's suit. The latter appeals.

The first count of the amended complaint reads as follows:

"2. That on to wit, May 17, 1943, said defendant, Harry Finerman, caused to be issued a Summons against the plaintiff and caused said Summons to be served upon the plaintiff, Peter Ligitsos, on or about May 18, 1943;

"3. That said suit was filed or instituted by the defendant Harry Finerman, against the plaintiff herein, as Case Number 4188097, of the Municipal Court of Chicago, First District, Chicago, Illinois;

PETER LIGHTS,)
Appellant,)
v.)
HARRY KINERMAN,)
Appellee.)

MR. JUSTICE SCAMMEL DELIVERED THE OPINION OF THE COURT.

Defendant's motion to strike and dismiss the amended complaint was sustained and an order was entered dismissing plaintiff's suit. The latter appeals.

The amended complaint contained three counts. The first count attempts to charge malicious prosecution. The second count attempts to charge a conspiracy to cheat and defraud plaintiff. The third count attempts to charge malicious abuse of legal process. The first count of the amended complaint reads as follows:

- "1. That on or to wit, May 17, 1943, the defendant filed or instituted a suit against the plaintiff and one James Gregory, in the Municipal Court of Chicago, First District, Chicago, Illinois, a Court of competent jurisdiction and a Court of Record, for an alleged indebtedness to the said defendant by a former partnership known as 'The Fruit Supply' conducted between the said James Gregory and plaintiff herein;
- "2. That on or to wit, May 17, 1943, said defendant, Harry Kinerman, caused to be issued a summons against the plaintiff and caused said summons to be served upon the plaintiff, Peter Lights, on or about May 18, 1943;
- "3. That said suit was filed or instituted by the defendant Harry Kinerman, against the plaintiff herein, as case number 17,007, of the Municipal Court of Chicago, First District, Chicago, Illinois;

"4. That said Summons was caused to be issued by the said defendant, Harry Finerman, against the plaintiff herein, and was caused to be served upon the said Peter Ligitsos, plaintiff herein, in the aforesaid suit filed or instituted by the said Harry Finerman, defendant herein, in the Municipal Court of Chicago, First District, Case Number 4188097;

"5. That said alleged indebtedness was alleged to be the balance due to said defendant, Harry Finerman, by Peter Ligitsos, plaintiff herein, for alleged goods, wares and merchandise allegedly purchased by the 'Fine Fruit Supply' partnership, between August 3, 1942 and August 19, 1942;

"6. That at the time of the filing or institution of said suit in the Municipal Court of Chicago, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Fine Fruit Supply' partnership nor the said Peter Ligitsos, plaintiff herein, had bought anything from said Harry Finerman, defendant herein, on credit nor were they or either of them indebted to said Harry Finerman in any amount whatsoever;

"7. That on to wit, June 1, 1943, the said suit filed and instituted by the said Harry Finerman, defendant herein, was stricken and dismissed by Order of the said Municipal Court of Chicago;

"8. That on to wit, June 11, 1943, the said defendant, Harry Finerman, filed or instituted another Statement of Claim or suit against the said Peter Ligitsos, plaintiff herein, in said Case Number 4188097, of the Municipal Court of Chicago, for an alleged indebtedness to the said Harry Finerman, for alleged goods, wares and merchandise allegedly purchased by the said 'Fine Fruit Supply' partnership between January 10, 1942 and August 31, 1942;

"9. That at the time of the filing or institution of

- "4. That said Gammans was caused to be issued by the said defendant, Harry Finerman, against the plaintiff herein, and was caused to be served upon the said Peter Lightos, plaintiff herein, in the aforesaid suit filed or instituted by the said Harry Finerman, defendant herein, in the Municipal Court of Chicago, First District, Case Number 4188097;
- "5. That said alleged indebtedness was alleged to be the balance due to said defendant, Harry Finerman, by Peter Lightos, plaintiff herein, for alleged goods, wares and merchandise allegedly purchased by the 'Time Fruit Supply' partnership, between August 3, 1942 and August 13, 1942;
- "6. That at the time of the filing or institution of said suit in the Municipal Court of Chicago, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Time Fruit Supply' partnership nor the said Peter Lightos, plaintiff herein, had bought anything from said Harry Finerman, defendant herein, on credit nor were they or either of them indebted to said Harry Finerman in any amount whatsoever;
- "7. That on or wit, June 1, 1943, the said suit filed and instituted by the said Harry Finerman, defendant herein, was stricken and dismissed by order of the said Municipal Court of Chicago;
- "8. That on or wit, June 11, 1943, the said defendant, Harry Finerman, filed or instituted another statement or claim or suit against the said Peter Lightos, plaintiff herein, in said Case Number 4188097, of the Municipal Court of Chicago, for an alleged indebtedness to the said Harry Finerman, for alleged goods, wares and merchandise allegedly purchased by the said 'Time Fruit Supply' partnership between January 10, 1942 and August 31, 1942;
- "9. That at the time of the filing or institution of

said Second Statement of Claim or suit, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Fine Fruit Supply' partnership nor the said Peter Ligitsos, plaintiff herein, had bought anything from the said Harry Finerman, on credit nor were they or either of them indebted to said Harry Finerman in any amount whatsoever;

"10. That on to wit, June 18, 1943, the said Second Statement of Claim or suit filed or instituted by the said Harry Finerman, defendant herein, was stricken and dismissed by Order of the said Municipal Court of Chicago;

"11. That on to wit, June 28, 1943, the said Harry Finerman, defendant herein, filed or instituted a third Statement of Claim or suit against the said Peter Ligitsos, plaintiff herein, in said Case Number 4188097 of the Municipal Court of Chicago, for an alleged indebtedness to the said Harry Finerman allegedly found to be due to said Harry Finerman, defendant herein, 'on or about the 28th day of August, 1942, and again on the 31st day of August, 1942', between the said Harry Finerman, defendant herein and the aforesaid James Gregory;

"12. That at the time of the filing or institution of said third Statement of Claim or suit, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Fine Fruit Supply' partnership nor the said Peter Ligitsos, plaintiff herein, were indebted to the said Harry Finerman, defendant herein, in any amount whatsoever;

"13. That on to wit, July 7, 1943, the said third Statement of Claim or suit filed or instituted by the said Harry Finerman, defendant herein, was stricken and dismissed by Order of the said Municipal Court of Chicago;

"14. That on to wit, July 12, 1943, the said Harry Finerman, defendant herein, filed or instituted a fourth Statement of Claim or suit against the said Peter Ligitsos,

said Second Statement of Claim or suit, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Time Fruit Supply' partnership nor the said Peter Higgins, plaintiff herein, had bought anything from the said Harry Finerman, on credit nor were they or either of them indebted to said Harry Finerman in any amount whatsoever; "10. That on to wit, June 18, 1943, the said Second

Statement of Claim or suit filed or instituted by the said Harry Finerman, defendant herein, was stricken and dismissed by Order of the said Municipal Court of Chicago; "11. That on to wit, June 28, 1943, the said Harry

Finerman, defendant herein, filed or instituted a third statement of claim or suit against the said Peter Higgins, plaintiff herein, in said Case Number 116308 of the Municipal Court of Chicago, for an alleged indebtedness to the said Harry Finerman allegedly found to be due to said Harry Finerman, defendant herein, on or about the 28th day of August, 1942, and again on the 1st day of August, 1943, between the said Harry Finerman, defendant herein and the aforesaid James Gregory;

"12. That at the time of the filing or institution of said third statement of claim or suit, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Time Fruit Supply' partnership nor the said Peter Higgins, plaintiff herein, were indebted to the said Harry Finerman, defendant herein, in any amount whatsoever; "13. That on to wit, July 2, 1943, the said third

Statement of Claim or suit filed or instituted by the said Harry Finerman, defendant herein, was stricken and dismissed by Order of the said Municipal Court of Chicago; "14. That on to wit, July 12, 1943, the said Harry

Finerman, defendant herein, filed or instituted a fourth Statement of Claim or suit against the said Peter Higgins,

plaintiff herein, in said Case Number 4188097 of the Municipal Court of Chicago, for an alleged indebtedness to the said Harry Finerman, for alleged goods, wares and merchandise allegedly 'sold and delivered' to the said 'Fine Fruit Supply' partnership, 'prior to the 31st day of August, 1942';

"15. That at the time of the filing or institution of said fourth Statement of Claim or suit, the said Harry Finerman, defendant herein, well knew or ought to know and should have known that neither the 'Fine Fruit Supply' partnership nor the said Peter Ligitsos, plaintiff herein, were indebted to the said Harry Finerman, in any amount whatsoever;

"16. That said Claims or Suits filed or instituted by said Harry Finerman, on the above mentioned dates against the said Peter Ligitsos, plaintiff herein, in said case Number 4188097 of the Municipal Court of Chicago, were false, unfounded, fraudulent and malicious and without probable cause;

"17. That said Claims or Suits filed or instituted by the said Harry Finerman, as hereinabove mentioned were filed and instituted wilfully, wantonly and maliciously and with deliberate intent to cheat and defraud and injure this plaintiff;

"18. That the said Harry Finerman, defendant herein, continued to prosecute and maintain his aforesaid Claim or Claims, Suit or Suits in the Municipal Court of Chicago, although he well knew, or ought to know and should have known that they were false, unfounded, fraudulent and malicious, until December 15, 1943, when the aforesaid prosecution or actions were terminated and judicially determined in favor of Peter Ligitsos, plaintiff herein; and against the said Harry Finerman, at his costs;

"19. That the said Peter Ligitsos, plaintiff herein, by reason of the aforesaid acts and doings of the defendant,

plaintiff herein, in said Case Number 418807 of the Municipal Court of Chicago, for an alleged indebtedness to the said Harry Lineman, for alleged goods, wares and merchandise allegedly sold and delivered, to the said 'Wine Fruit Supply', prior to the first day of August, 1942;

"15. That at the time of the filing or institution of said fourth Statement of Claim or suit, the said Harry Lineman, defendant herein, well knew or ought to know and should have known that neither the 'Wine Fruit Supply' partnership nor the said Peter Lightos, plaintiff herein, were indebted to the said Harry Lineman, in any amount whatsoever;

"16. That said Claims or Suits filed or instituted by said Harry Lineman, on the above mentioned dates against the said Peter Lightos, plaintiff herein, in said Case Number 418807 of the Municipal Court of Chicago, were false, unfounded, fraudulent and malicious and without probable cause;

"17. That said Claims or Suits filed or instituted by the said Harry Lineman, as heretofore mentioned were filed and instated willfully, wantonly and maliciously and with deliberate intent to cheat and defraud and injure this plaintiff;

"18. That the said Harry Lineman, defendant herein, continued to prosecute and maintain his aforesaid Claim or Claims, Suit or Suits in the Municipal Court of Chicago, although he well knew, or ought to know and should have known that they were false, unfounded, fraudulent and malicious, until December 15, 1943, when the aforesaid prosecution or actions were terminated and judicially determined in favor of Peter Lightos, plaintiff herein; and against the said Harry Lineman, at his costs;

"19. That the said Peter Lightos, plaintiff herein, by reason of the aforesaid acts and doings of the defendant,

Harry Finerman, has been and is greatly injured in his credit and reputation, and this plaintiff was forced to expend and contract to expend large sums of money in defending the aforesaid false, fraudulent, unfounded and malicious Claims or Suits filed or instituted by the said Harry Finerman, defendant herein, and did pay and contracted to pay large sums of money for attorney's fees, costs and expenses in the defense of said Claims or Suits filed or instituted by the defendant herein in the Municipal Court of Chicago, Case Number 4188097;

"20. That by reason of the aforesaid wrongful, malicious and vexatious acts, doings and conduct of the defendant herein, Harry Finerman, the plaintiff is entitled to exemplary and punitive damages.

"Wherefore, the plaintiff, Peter Ligitsos, prays for judgment against the defendant, Harry Finerman, in the sum of Ten Thousand Dollars (\$10,000.00), said judgment to include and incorporate therein that malice is the gist of the action." (Italics ours.)

Plaintiff contends that count one makes out a prima facie case of malicious prosecution. We agree with the ruling of the trial court that it does not. It will be noted that there are no allegations that defendant caused the arrest of plaintiff nor that he seized any property belonging to plaintiff or the partnership, and it is plain that defendant filed but one law suit against plaintiff, "Case Number 4188097," although counsel for plaintiff insists that defendant by filing a new statement of claim after a preceding statement of claim had been stricken in effect filed a new suit, and therefore, plaintiff argues, defendant Finerman filed four different suits or claims against plaintiff. Plaintiff's strained argument is an attempt to bring the case stated in count one within the rule stated in Shedd v. Patterson, 302 Ill. 355, where the Supreme court held that where a defendant has been sued several times by the same

Harry Finerman, has been and is greatly injured in his credit and reputation, and this plaintiff was forced to expend and contract to expend large sums of money in defending the afore- said false, fraudulent, unfounded and malicious claims or suits filed or instituted by the said Harry Finerman, defendant herein, and did pay and contracted to pay large sums of money for attorney's fees, costs and expenses in the defense of said claims or suits filed or instituted by the defendant herein in the Municipal Court of Chicago, Case Number 4183097;

"20. That by reason of the aforesaid wrongful, malicious and vexatious acts, doings and conduct of the defendant herein, Harry Finerman, the plaintiff is entitled to exemplary and punitive damages.

"Wherefore, the plaintiff, Peter Ligas, prays for judgment against the defendant, Harry Finerman, in the sum of Ten Thousand Dollars (\$10,000.00), said judgment to include and incorporate therein that value is the gist of the action." (Telles owns.)

Plaintiff contends that count one makes out a prima facie case of malicious prosecution. We agree with the ruling of the trial court that it does not. It will be noted that there are no allegations that defendant caused the arrest of plaintiff nor that he seized any property belonging to plaintiff or the partnership, and it is plain that defendant filed but one law suit against plaintiff, "Case Number 4183097," although counsel for plaintiff insists that defend nt by filing a new statement of claim after a preceding statement of claim had been stricken in effect filed a new suit, and therefore, plaintiff argues, defendant Finerman filed four different suits or claims against plaintiff. Plaintiff's strained argument is an attempt to bring the case stated in count one within the rule stated in Shedd v. Patterson, 308 Ill. 357, where the Supreme Court held that where a defendant has been sued several times by the same

person, both in equity and at law, in regard to the same property, with final judgments against the complainant or plaintiff by courts of review in every suit, the defendant, upon being sued again on the same cause of action, may maintain an action for malicious prosecution although the suits against him were by summons, only, and not by his arrest or a seizure of his property. There it appeared that the defendant had commenced five suits in equity and four actions at law seeking relief in equity or damages in actions at law, and all relating to the same subject matter. In Schwartz v. Schwartz, 366 Ill. 247, the court, passing upon a suit for malicious prosecution of a civil suit without probable cause, said (p. 250):

"An action for malicious prosecution is one for damages brought by a person against whom a criminal prosecution or a suit has been instituted maliciously and without probable cause. This court has had occasion to say that the law does not look with favor upon such suits. One of the essentials of such a cause of action is that the prior litigation complained of shall have terminated in favor of the defendant therein. A suit for malicious prosecution of a civil suit without probable cause cannot be maintained where the action upon which it is grounded is an ordinary civil action, begun by summons and not accompanied by arrest of the person or seizure of his property, or by special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action. Norin v. Scheldt Manf. Co., 297 Ill. 521; Bonney v. King, 201 id. 47; Smith v. Michigan Buggy Co., 175 id. 619." The court further stated (pp. 250, 251): "In Shedd v. Patterson, supra, [302 Ill. 355], the defendant in the malicious prosecution suit had many times brought suit against the plaintiff after having had all the merits of such suit determined against

person, both in equity and at law, in regard to the same property, with final judgments against the complainant or plaintiff by courts of review in every suit, the defendant upon being sued again on the same cause of action, may maintain an action for malicious prosecution although the suits against him were by summons only, and not by writ arrest or a seizure of his property. There it appeared that the defendant had commenced five suits in equity and four actions at law seeking relief in equity or damages in actions at law, and all relating to the same subject matter. In Schwaner v. Schwaner, 306 Ill. 247, the court, passing upon a writ for malicious prosecution of a civil suit without probable cause, said (p. 250):

"An action for malicious prosecution is one for damages brought by a person against whom a criminal prosecution or a suit has been instituted maliciously and without probable cause. This court has had occasion to say that the law does not look with favor upon such suits. One of the essentials of such a cause of action is that the prior litigation complained of shall have terminated in favor of the defendant therein. A writ for malicious prosecution of a civil suit without probable cause cannot be maintained where the action upon which it is grounded is an ordinary civil action, begun by summons and not accompanied by arrest of the person or seizure of his property, or by special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action. Horn v. Schwaner, 307 Ill. 247; Schwaner v. Schwaner, 301 Ill. 447; Schwaner v. Schwaner, 301 Ill. 447. The court further stated (pp. 250, 251): 'In Schwaner v. Schwaner, 301 Ill. 447, the defendant in the malicious prosecution suit had many times brought suit against the plaintiff after having had all the writs of such suit determined against

him and it was deemed that such was not an ordinary civil suit but was extraordinary in that the repeated bringing of the suit, after final determination, amounted to harassment."

In Shedd v. Patterson, the opinion states (pp. 359, 360):

"An action for malicious prosecution is an action for damages by one against whom a criminal prosecution or civil suit has been instituted maliciously and without probable cause after the termination of such prosecution or suit in favor of the defendant therein, (18 R. C. L. 11,) and it is not favored in the law. This court has regarded it reasonable that the action should be limited because the courts of law are open to every citizen upon the penalty of lawful costs, and he may have his rights determined without the risk of being sued and having to respond in damages for seeking to enforce his right. In Smith v. Michigan Buggy Co., *supra* [175 Ill. 619], the court said there was danger that litigation would be promoted and encouraged by permitting such suits to be brought, because the conclusion of one suit would be but the beginning of another; that a successful defendant would be tempted to bring another suit for the purpose of showing malice and want of probable cause, and litigation would become interminable."

Here we have a single ordinary suit in assumpsit where the plaintiff (defendant in the instant suit) amended his complaint several times, as he had a perfect right to do, and where judgment for costs was finally entered against him.

The contention of plaintiff that count one states an action for malicious prosecution is without the slightest merit.

Count two of the amended complaint, which plaintiff contends makes out a prima facie case of conspiracy to

him and it was deemed that such was not an ordinary civil
suit but was extraordinary in that the repeated bringing
of the suit, after final determination, amounted to harass-
ment."

In Boyd v. Peterson, the opinion states (p. 392),

300):

"An action for malicious prosecution is an action for
damages by one against whom a criminal prosecution or civil
suit has been instituted maliciously and without probable
cause after the termination of such prosecution or suit in
favor of the defendant therein, 18 R. C. L. 11, and it is
not favored in the law. This court has regarded it reason-
able that the action should be limited because the courts of
law are open to every citizen upon the penalty of lawful costs,
and he may have his rights determined without the risk of being
sued and having to respond in damages for seeking to enforce
his right. In Smith v. Johnson & Co., supra [197 Ill.
61], the court said there was danger that litigation would
be promoted and encouraged by permitting such suits to be
brought, because the conclusion of one suit would be but the
beginning of another that a successful defendant would be
tempted to bring another suit for the purpose of showing
malice and want of probable cause, and litigation would become
intenable."

Here we have a single ordinary suit in assumpsit where
the plaintiff (defendant in the instant suit) pleaded his
complaint several times, as he had a perfect right to do, and
where judgment for costs was finally entered against him.
The contention of plaintiff that court one states an
action for malicious prosecution is without the slightest
merit.

Count two of the amended complaint, which plaintiff

contents makes out a prima facie case of conspiracy to

cheat and defraud him with malicious intent, is a long, rambling pleading, filled with general allegations of conspiracy and fraud; division "of spoils" exacted from plaintiff by defendant and his fellow conspirator, Gregory; "wrongful, unlawful, wilful, wanton, malicious and vexatious acts" of defendant and Gregory. After a patient consideration of the allegations of count two we have reached the conclusion that the count does not meet the requirements of the established rules that apply to the charge contained in the instant count.

"In alleging fraud, it is well settled, both at law and in equity, that the mere general averment, without setting out the facts, upon which the charge is predicated, is insufficient. *** It is essential that the facts and circumstances which constitute it (the fraud) should be set out clearly, concisely, and with sufficient particularity to apprise the opposite party of what he is called upon to answer.' (9 Ency. of Pl. & Pr. pp. 686, 687; Brooks v. O'Hara, 8 Fed. Rep. 529; Jones v. Albee, 70 Ill. 34; Klein v. Horine, 47 id. 430). In Smith v. Brittenham, 98 Ill. 188, we said: 'Charges of fraud should not be general, but the facts should be stated upon which the charges are based.'" (Murphy v. Murphy, 189 Ill. 360, 365.) Many other cases to the same effect might be cited if it were necessary.

If plaintiff had, in fact, a case of conspiracy to cheat and defraud with malicious intent against defendant, his counsel should not have stood upon count two. Defendant calls attention to the fact that one of the grounds alleged in his motion to strike was "that by virtue of a settlement agreement by and between Peter Ligitso and James Gregory, co-partners, a copy of which is attached hereto and made a part hereof and marked Exhibit 'A,' the plaintiff herein is estopped and barred from maintaining this action and it should

ed prices that apply to the large contained in the instant
that the court does not find the requirements of the establish-
of the allegations of count two we have reached the conclusion
"case" of defendant and Gregory. After a patient consideration
another, defendant, Gregory, and various other persons and
tiff by defendant and his fellow conspirators, Gregory,
sparsity and fraud; Division "of a whole" extracted from plain-
reaching his dying, failed with several allegations of con-
which was believed to be a violation of the law.

"In alleging fraud, it is well settled, both at law
 and in equity, that the mere general averment, without setting
 out the facts upon which the charge is predicated, is in-
 sufficient." It is essential that the facts and circum-
 stances which constitute it (the fraud) should be set out
 clearly, concisely, and with sufficient particularity to
 apprise the opposite party of what he is called upon to
 answer. (9ency. of W. & W. pp. 336, 337; Proctor v.
O'Hara, 8 Fed. Rep. 323; James v. Rice, 70 Ill. 34; Klein
v. Worline, 47 Ill. 430). In Smith v. Hightower, 28 Ill. 123,
 we said: "Charge of fraud should not be general, but the
 facts should be stated upon which the charges are based."
 (Smith v. Hightower, 28 Ill. 123, 367.) Any other case
 to the same effect might be cited if it were necessary.
 If plaintiff had, in fact, a case of conspiracy to
 defraud and defraud with malicious intent against defendant,
 his counsel should not have stood upon count two. Defendant
 calls attention to the fact that one of the grounds alleged
 in his motion to strike was "that by virtue of a settlement
 agreement by and between Peter Higgins and James Gregory,
 co-partners, a copy of which is attached hereto and made a
 part hereof and marked Exhibit 'A', the plaintiff herein is
 estopped and barred from maintaining this action and it should

be dismissed"; that attached to the motion to strike and made a part of the same was Exhibit A, which purports to be an agreement between James Gregory and Peter Ligitsos, executed September 4, 1943, and witnessed by Peter S. Sarelas, plaintiff's counsel; that by the agreement the partnership is dissolved, and for a consideration of \$2,000 paid to Ligitsos all of the assets of the partnership were sold and delivered to Gregory and the latter assumed all of the debts of the partnership, and plaintiff released Gregory from all claims of every kind and description. We agree with plaintiff's contention that the settlement agreement set up in defendant's motion to strike cannot be considered in support of that motion, and it ~~was~~not necessary for the trial court to consider the alleged agreement in ruling upon defendant's motion. We feel impelled to state, however, that there is force in defendant's argument that it was because of the said agreement that plaintiff did not make Gregory a party to the suit, although he charges the latter with being a party to the alleged conspiracy. The instant suit was commenced August 10, 1944.

As to count three of the amended complaint, which plaintiff contends states an action for malicious abuse of legal process: In Jeffery v. Robbins, 73 Ill. App. 353, Mr. Justice Sears, who delivered the opinion of the court, filed a lengthy opinion in which the essential elements of an action for the abuse of legal process are stated. The opinion states (p. 355): "The cases based upon an abuse of process are comparatively few, and a considerable proportion of those reported and cited as such, are found, upon examination, to have been in fact actions for malicious prosecution." The court, after reviewing a number of cases, concludes (pp. 360, 361): "And to constitute such improper direction of process, the mere existence of an ulterior motive in doing an act proper in itself, would not suffice, but

be dismissed"; that attached to the motion to strike and made a part of the same was Exhibit A, which purports to be an agreement between James Gregory and Peter Ligtos, executed September 4, 1943, and witnessed by Peter Ligtos, plaintiff's counsel; that by the agreement the partnership is dissolved, and for a consideration of \$2,000 paid to Ligtos all of the assets of the partnership were sold and delivered to Gregory and the latter assumed all of the debts of the partnership, and plaintiff released Gregory from all claims of every kind and description. He agrees with plaintiff's contention that the settlement agreement set up in defendant's motion to strike cannot be considered in support of that motion, and it was not necessary for the trial court to consider the alleged agreement in ruling upon defendant's motion. He feels impelled to state, however, that there is force in defendant's argument that it was because of the said agreement that plaintiff did not make Gregory a party to the suit, although he charges the latter with being a party to the alleged conspiracy. The instant suit was commenced August 10, 1944.

As to count three of the amended complaint, which plaintiff contends states an action for malicious abuse of legal process: In *Laffey v. Robins*, 73 Ill. App. 353, Mr. Justice Sears, who delivered the opinion of the court, filed a lengthy opinion in which the essential elements of an action for the abuse of legal process are stated. The opinion states (p. 357): "The cases based upon an abuse of process are comparatively few, and a considerable proportion of those reported and cited as such, are found, upon examination, to have been in fact actions for malicious prosecution." The court, after reviewing a number of cases, concludes (p. 360, 361): "And to constitute such improper direction of process, the mere existence of an ulterior motive in being an act proper in itself, would not suffice, but

there must be such an use of it as is in itself without the scope of the process and improper, from which motive may perhaps be inferred. It would seem, both from authority and reason, that to sustain the action these two elements are essential - first, the existence of an ulterior motive, and, second, an act in the use of process other than such as would be proper in the regular prosecution of the charge. From the latter the former may perhaps be inferred, but the existence of the former could not, in reason, dispense with proof of the latter, - for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial. *** Abuse implies irregular and improper use, not merely regular and proper use with a bad motive." The court cites the following from Wood v. Graves et al., 144 Mass. 365, (73 Ill. App. pp. 358, 359): "There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceedings upon the process, was justifiable and proper in its inception. But the grievance to be redressed arises in consequence of subsequent proceedings. For example, if after an arrest upon civil or criminal process, the person arrested is subject to unwarrantable insults and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue hardship, he has a remedy, etc. *** Perhaps the most frequent form of such abuse is by working upon the fears of the person under arrest, for the purpose of extorting money, or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act in accordance with the wishes of those who have control of the prosecution,' citing Grainger v. Hill [4 Bing. N. C. 212]: 'He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it to effect an object not

there must be such an aim of it as is in itself without the scope of the process and its proper, from which no law perhaps be inferred. It would seem, both from authority and reason, that to sustain the action these two elements are essential - first, the existence of an ulterior motive, and, second, an act in the use of process other than such as would be proper in the regular prosecution of the charge. From the latter the former may perhaps be inferred, but the existence of the former could not, in reason, dispense with proof of the latter - for if the act of the prosecutor be in itself regular, the motive, ulterior or otherwise, is immaterial. And those who are irregular and i proper use, not merely regular and proper use with a bad motive." The court cites the following from Boyd v. Hayes et al., 144 Mass. 367, (75 Ill. App. 388, 1897): "There is no doubt that an action lies for the malicious abuse of lawful process, civil or criminal. It is to be assumed, in such a case, that the process was lawfully issued for a just cause, and is valid in form, and that the arrest or other proceedings upon the process, was justifiable and proper in its inception. But the damages to be redressed arise in consequence of subsequent proceedings. For example, if after an arrest upon civil or criminal process, the person arrested is subject to unwarrantable harshness and indignities, is treated with cruelty, is deprived of proper food, or is otherwise treated with oppression and undue harshness, he has a remedy, etc. ... Perhaps the most frequent form of such abuse is by retaining upon the fears of the person under arrest, for the purpose of extorting money, or other property, or of compelling him to sign some paper, to give up some claim, or to do some other act in accordance with the wishes of those who have control of the prosecution, citing Grady v. Hill [4 Bing. N. C. 118]. He was held entitled to recover damages, not for maliciously putting the process in force, but for maliciously abusing it to effect an object not

within its proper scope."

In the instant case, it must be remembered, the defendant is not charged with causing the arrest of plaintiff nor of seizing any of the property of plaintiff or of the partnership. The only legal process in the assumpsit suit was the summons, and upon the face of the amended complaint it is clear that defendant did not use that process for any other purpose than to bring the partners, Ligitsos and Gregory, into the jurisdiction of the Municipal court. We are satisfied that the trial court was justified in holding that the third count was vulnerable to a motion to strike.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

within its proper scope."

In the instant case, it must be remembered, the defendant is not charged with causing the arrest of plaintiff nor of retaining any of the property of plaintiff or of the partnership. The only legal process in the case is a writ of habeas corpus, and upon the face of the amended complaint it is clear that defendant did not use that process for any other purpose than to bring the partners, Higgins and Gregory, into the jurisdiction of the Municipal court. We are satisfied that the trial court was justified in holding that the third count was vulnerable to a motion to strike.

The judgment of the Circuit court of Cook county is

affirmed.

JUDGMENT AFFIRMED.

Delivered, E. J., and Triens, J., concur.

43556

329 I.A. 241²

CHESTER BOWLES, Administrator,
Office of Price Administration,
for and on behalf of U. S. A.,
Appellee,

v.

JAMES O. KOONTZ,

Appellant.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

414

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered against him in the Circuit court of Cook county June 26, 1945.

The judgment reads as follows:

"This matter comes on to be heard on May 25, 1945 upon defendant's petition for an injunction against the plaintiff and plaintiff's motion to dismiss defendant's counterclaim, and on May 26, 1945 upon plaintiff's complaint, defendant's answer and plaintiff's reply thereto. The court, in the course of said hearings, heard and considered testimony of witnesses, including the defendant, and other evidence presented in open court by and on behalf of the defendant relating to the merits of the issues raised by plaintiff's complaint, defendant's answer and plaintiff's reply thereto, and argument of counsel thereto. The defendant having stated that he had no further evidence to present, upon an examination and consideration of said pleadings, the affidavits thereto attached, the evidence, oral, written and documentary, presented by and on behalf of the defendant and the arguments of counsel, and being fully advised in the premises, the Court now finds and concludes as follows:

"1. This Court has jurisdiction of the subject matter of this suit and of the parties hereto.

"2. Since July 1, 1942, there has been in full force and effect the Rent Regulation for Housing (8 Fed. Reg. 7322), originally designated Maximum Rent Regulation No. 28 (7 Fed.

43756

CHRISTOPHER BOWEN, Administrator,
Office of Price Administration,
for and on behalf of U. S. A.,
Appellee,

Appellant.

v.

JAMES O. SCOTT,

COURT OF COOK COUNTY,
APPEAL FROM CIRCUIT

THE JUSTICE SCOTTIAN REVIEWED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered against

him in the Circuit Court of Cook County June 26, 1945.

The judgment reads as follows:

"This matter comes on to be heard on May 25, 1945

upon defendant's petition for an injunction against the plain-

tiff and plaintiff's motion to dismiss defendant's counter-

claim, and on May 26, 1945 upon plaintiff's complaint, defend-

ant's answer and plaintiff's reply thereto. The court, in the

course of said hearings, heard and considered testimony of

witnesses, including the defendant, and other evidence presented

in open court by and on behalf of the defendant relating to

the merits of the issues raised by plaintiff's complaint,

defendant's answer and plaintiff's reply thereto, and argument

of counsel thereto. The defendant having stated that he had

no further evidence to present, upon an examination and con-

sideration of said pleadings, the affidavits thereto attached,

the evidence, oral, written and documentary, presented by and

on behalf of the defendant and the arguments of counsel, and

being fully advised in the premises, the Court now finds and

concludes as follows:

"1. This Court has jurisdiction of the subject matter

of this suit and of the parties hereto.

"2. Since July 1, 1942, there has been in full force

and effect the Rent Regulation for Housing (8 Fed. Reg. 7322),

originally designated Maximum Rent Regulation No. 28 (7 Fed.

Reg. 4913), establishing maximum rents for housing and accommodations located in the Chicago Defense-Rental Area, consisting of the Counties of Cook, Lake, Dupage and Kane in the State of Illinois. Said Rent Regulation for Housing, as now and hereafter amended, is hereinafter called the 'Rent Regulation.'

"3. The defendant is the owner, operator, agent or manager receiving or entitled to receive rent for housing accommodations rented or offered for rent by him and commonly described as follows: 512 Ingraham Avenue, Calumet City, Illinois Rear Four Room Apartment.

"4. The rent of said housing accommodations on March 1, 1942, being the maximum rent thereof under Section 4 (a) of the Rent Regulation, was \$9.00 per week.

"5. The maximum rent of said housing accommodations is now, and since July 1, 1942 has been, \$9.00 per week.

"6. No order increasing the maximum rent of said housing accommodations has been entered by the Rent Director of the Chicago Defense-Rental Area, or his predecessors in office.

"7. Since July 1, 1942, the defendant has demanded and received for said housing accommodations rent in excess of the maximum rent thereof, in violation of Section 2 of the Rent Regulation and Section 4 of the Emergency Price Control Act of 1942, in that during the period from May 31, 1944 to December 28, 1944, the defendant demanded and received from one Thelma Lundeen, a tenant of said housing accommodations, rent in the amount of \$10.00 per week.

"8. The demand and receipt by the defendant of said rent in excess of the maximum rent of said housing accommodations was not wilful and was not the result of a failure by the defendant to take practicable precautions against the occurrence thereof.

"9. The plaintiff is entitled to a permanent injunction

Reg. 4913), establishing maximum rents for housing and accommodations located in the Chicago Defense-Rental Area, consisting of the Counties of Cook, Lake, DuPage and Kane in the State of Illinois. Said Rent Regulation for Housing, as now and hereafter amended, is hereinafter called the 'Rent Regulation.' 3. The defendant is the owner, operator, agent or manager receiving or entitled to receive rent for housing accommodations rented or offered for rent by him and commonly described as follows: 212 Ingraham Avenue, Calumet City, Illinois Rear Town Room Apartment.

4. The rent of said housing accommodations on March 1, 1942, being the maximum rent thereof under Section 4 (a) of the Rent Regulation, was \$9.00 per week.

5. The maximum rent of said housing accommodations is not, and since July 1, 1942 has been, \$9.00 per week.

6. No order increasing the maximum rent of said housing accommodations has been entered by the Rent Director of the Chicago Defense-Rental Area, or his predecessors in office.

7. Since July 1, 1942, the defendant has demanded and received for said housing accommodations rent in excess of the maximum rent thereof, in violation of Section 2 of the Rent Regulation and Section 4 of the Emergency Price Control Act of 1942, in that during the period from May 21, 1944 to December 2, 1944, the defendant demanded and received from one Thelma Lynette, a tenant of said housing accommodations, rent in the amount of \$10.00 per week.

8. The demand and receipt by the defendant of said rent in excess of the maximum rent of said housing accommodations was not lawful and was not the result of a failure by the defendant to take practicable precautions against the occurrence thereof.

9. The plaintiff is entitled to a permanent injunction

restraining the defendant from further violations of the Rent Regulation and is further entitled to judgment against the defendant in the amount of rent demanded and received by the defendant from said tenant in excess of the maximum rent of said housing accommodations on and after July 1, 1944, pursuant to Section 205 (e) of said Emergency Price Control Act of 1942, as amended.

"It Is Therefore Ordered, Adjudged and Decreed as follows:

"A. The defendant, James O. Koontz, his agents, servants, employees, attorneys and all persons in active concert or participation with him be, and they are, hereby permanently enjoined from directly or indirectly demanding or receiving rent for any housing accommodations, of which the defendant is the landlord receiving or entitled to receive rents, in amounts higher than the maximum rents therefor as determined under the Rent Regulation for Housing.

"B. The defendant refund to the tenant or tenants of said housing accommodations all amounts received from said tenant or tenants as rent for said housing accommodations in excess of the maximum rent thereof, as determined under the Rent Regulation for Housing, during the period from July 1, 1942 to June 30, 1944.

"C. That the plaintiff, on behalf of the United States, have judgment against the defendant in the amount of \$26.00 together with the costs of this suit."

Prior to the entry of the final judgment a counterclaim filed by defendant was ordered dismissed but defendant makes no complaint as to that order. Defendant failed to file a transcript of the proceedings of the trial and we must look to the judgment order for the facts. It appears from the record that on February 1, 1945, defendant filed a written demand for a jury trial. Defendant appears as his own attorney in this proceeding. He is no

restaining the defendant from further violations of the Rent Regulation and is further entitled to judgment against the defendant in the amount of rent demanded and received by the defendant from said tenant in excess of the maximum rent of said housing accommodations on and after July 1, 1944, pursuant to Section 207 (e) of said Emergency Price Control Act of 1942, as amended.

"It is therefore Ordered, Adjudged and Decreed as

follows:

"A. The defendant, James O. Koonce, his agents, servants, employees, attorneys and all persons in active concert or participation with him be, and they are, hereby permanently enjoined from directly or indirectly demanding or receiving rent for any housing accommodations, of which the defendant is the landlord receiving or entitled to receive rents, in amounts higher than the maximum rents therefor as determined under the Rent Regulation for Housing.

"B. The defendant refund to the tenant or tenants of said housing accommodations all amounts received from said tenant or tenants as rent for said housing accommodations in excess of the maximum rent therefor, as determined under the Rent Regulation for Housing, during the period from July 1, 1942 to June 30, 1944.

"C. That the plaintiff, on behalf of the United States, have judgment against the defendant in the amount of \$26.00 together with the costs of this suit."

Prior to the entry of the final judgment a counterclaim filed by defendant was ordered dismissed but defendant makes no complaint as to that order. Defendant failed to file a transcript of the proceedings of the trial and we must look to the judgment order for the facts. It appears from the record that on February 1, 1945, defendant filed a written demand for a jury trial. Defendant appears as his own attorney in this proceeding. He is no

stranger to legal proceedings.

The complaint filed by plaintiff reads as follows:

"Now comes Chester Bowles, plaintiff, by his attorney, and complains of the defendant, James O. Koontz, as follows:

Count One

"1. In the judgment of the plaintiff, the defendant has engaged in acts and practices which constitute violations of Section 4 of the Emergency Price control Act of 1942, as amended (56 Stat., 23: 50 U. S. C. A. App. Secs. 901-971), hereinafter called 'the Act', in that the defendant violated the Rent Regulation for Housing, (8 Fed. Reg. 7322), as amended. Pursuant to Section 205 (a) of the Act, the plaintiff brings this action to enjoin such acts or practices and enforce compliance with Section 4 of the Act.

"2. Since July 1, 1942, and at all times herein mentioned, there has been in force and effect the Rent Regulation for Housing (8 Fed. Reg. 7322), originally designated Maximum Rent Regulation No. 28 (7 Fed. Reg. 4913), establishing maximum rents for housing accommodations located in the Chicago Defense-Rental Area, consisting of the counties of Cook, Lake, Dupage and Kane in the State of Illinois. Said Rent Regulation for Housing, as now and hereafter amended, is hereinafter called the 'Rent Regulation.'

"3. Under the provisions of Sections 2 and 4 of the Rent Regulation, no landlord of any housing accommodations rented on March 1, 1942 may demand or receive for such housing accommodation rent in excess of rent therefor on that date. Under Section 7 of the Rent Regulation, every landlord of housing accommodations rented or offered for rent is required to file a registration statement relating thereto and setting forth information with respect to the rent thereof and the services and equipment provided therewith.

stranger to legal proceedings.

The complaint filed by plaintiff reads as follows:

"I, comes Chester Bowles, plaintiff, by his attorney, and complains of the defendant, James O. Koonce, as follows:

Count One

"1. In the judgment of the plaintiff, the defendant has engaged in acts and practices which constitute violations of section 4 of the Emergency Price Control Act of 1942, as amended (56 Stat., 23: 70 U. S. C. A. App. Secs. 901-917), hereinafter called 'the Act', in that the defendant violated the Rent Regulation for Housing, (8 Fed. Reg. 7322), as amended. Pursuant to Section 207 (a) of the Act, the plaintiff brings this action to enjoin such acts or practices and enforce compliance with Section 4 of the Act.

"2. Since July 1, 1942, and at all times herein mentioned, there has been in force and effect the Rent Regulation for Housing (3 Fed. Reg. 7322), originally designated Maximum Rent Regulation No. 28 (7 Fed. Reg. 4213), establishing maximum rents for housing accommodations located in the Chicago Defense-Rental Area, consisting of the counties of Cook, Lake, DuPage and Kane in the State of Illinois. Said Rent Regulation for Housing, as now and hereinafter amended, is hereinafter called the 'Rent Regulation.'

"3. Under the provisions of Sections 2 and 4 of the Rent Regulation, no landlord of any housing accommodations rented on March 1, 1942 may demand or receive for such housing accommodations rent in excess of rent therefor on that date. Under section 7 of the Rent Regulation, every landlord of housing accommodations rented or offered for rent is required to file a registration statement relating thereto and setting forth information with respect to the rent thereof and the services and equipment provided therefor.

"4. The defendant is the owner, sublessor, operator, agent or manager receiving or entitled to receive rent for housing accommodations rented or offered for rent by him and commonly described as follows: 512 Ingraham Avenue, Calumet City, Illinois. Rent for-room [four-room] apartment

"5. Attached hereto, marked as indicated below, and by this reference made a part hereof, are the following documents: Exhibit A - Affidavit of James O. Koontz Exhibit B - Affidavit of Thelma Lundeen

"6. As appears from Exhibit A, the rent of said housing accommodation on March 1, 1942, being the maximum rent thereof under Section 4 (a) of the Rent Regulation, was \$9.00 per week.

"7. As appears from Exhibit B, since July 1, 1942, defendant has demanded and received for said housing accommodations rent in excess of the monthly maximum rent thereof in violation of Section 2 of the Rent Regulation and Section 4 of the Act, all as more fully set forth in the following table:

<u>"Maximum Rent</u>	<u>Rent Collected</u>	<u>Period</u>
\$9.00 per week	\$10.00 per week	May 31, 1944 to December 28, 1944

"8. Unless the defendant is ordered to comply with and enjoined from violating the Act and Rent Regulation pending the final determination of this cause, the purposes of the Act and the policies of the United States, as set forth therein, will be defeated, and any judgment which this court may enter on final determination of this cause will be, to the extent of defendant's prior acts or failures or refusals to act, of no effect.

"Count Two

"1. Plaintiff re-alleges, as though set forth here in full, the allegations contained in paragraphs 2 to 6, inclusive of Count One of this Complaint. Plaintiff brings this suit under this Count Two pursuant to Section 206 (e) [205 (e)]

"4. The defendant is the owner, manager, operator, agent or manager receiving or entitled to receive rent for housing accommodations rented or offered for rent by him and commonly described as follows: 1111 Madison Avenue, Calumet City, Illinois. Rent for room [four-room] apartment

"5. Attached hereto, marked as indicated below, and by this reference made a part hereto, are the following documents: Exhibit A - Affidavit of James C. [illegible] Exhibit B - Affidavit of [illegible]

"6. As appears from Exhibit A, the rent of said housing accommodation on March 1, 1942, being the maximum rent thereof under Section 4 (a) of the Rent Regulation, was \$9.00 per week. "7. As appears from Exhibit B, since July 1, 1942, defendant has demanded and received for said housing accommodation rent in excess of the monthly maximum rent thereof in violation of Section 4 of the Rent Regulation and Section 4 of the Act, alias more fully set forth in the following table:

Period	Maximum Rent	Rent Collected
May 31, 1942 to December 31, 1942	\$9.00 per week	\$10.00 per week

"8. Unless the defendant is ordered to comply with and enjoined from violating the Act and Rent Regulation pending the final determination of this case, the purposes of the Act and the policies of the United States, as set forth therein, will be defeated, and any judgment which this court may enter on final determination of this case will be, to the extent of defendant's prior acts or failures or refusals to act, of no effect.

"Count Two

"1. Plaintiff re-alleges, as though set forth here in full, the allegations contained in paragraphs 2 to 6, inclusive of Count One of this Complaint. Plaintiff brings this suit under this Count Two pursuant to Section 206 (e) [205 (e)]

of the Act.

"2. On or after July 1, 1944, and at least thirty days prior to the filing hereof, defendant demanded and received for said housing accommodations rent in excess of the maximum rent thereof, all as more fully set forth in the following table:

<u>"Tenant</u>	<u>Maximum Rent</u>	<u>Rent Collected</u>	<u>Period</u>
Thelma Lundeen	\$9.00 per week	\$10.00 per week	July 1, 1944 to December 28, 1944

"Wherefore, the plaintiff prays:

"1. A temporary and final injunction against the defendant, his agents, servants, employees, attorneys and all persons in active concert or participation with them, enjoining them from directly or indirectly demanding or receiving rent for any housing accommodations, of which the defendant is the landlord receiving or entitled to receive rent, in amount higher than the maximum rent therefor as determined under the Rent Regulation.

"2. A final order requiring the defendant to refund to the tenant or tenants of said housing accommodations on and after July 1, 1942 all amounts received from said tenant or tenants as rent for said housing accommodations in excess of the maximum rent thereof prior to July 1, 1944.

"3. Judgment against the defendant in the amount of \$78.00 together with the costs of this suit.

"4. Such other, further and different relief as the court may deem just and proper."

If we understand defendant's main contention correctly, he makes no claim that plaintiff was not entitled to the relief sought under count one. He states: "Count One of the complaint, was filed pursuant to Section 205 (a) of the Act for injunctive relief and under that section of the act the Court may grant a temporary or final restraining order without bond. The relief under that section is injunctive only and is in chancery." He claims, however, that count two of the complaint was filed pursuant to Section 205 (e) of the Act and that the proceeding

of the Act.

"2. On or after July 1, 1944, and at least thirty days prior to the filing hereof, defendant demanded and received for said housing accommodations rent in excess of the maximum rent thereof, all as more fully set forth in the following table:

Period	Rent Collected	Maximum Rent
July 1, 1944 to December 31, 1944	\$10.00 per week	\$8.00 per week

"Wherefore, the plaintiff prays:

"1. A temporary and final injunction against the defend-

ant, his agents, servants, employees, attorneys and all persons in active concert or participation with them, enjoining them from directly or indirectly demanding or receiving rent for any

housing accommodations, or which the defendant is the landlord receiving or entitled to receive rent, in amount higher than the maximum rent therefor as determined under the Rent Regulation.

"2. A final order requiring the defendant to return to

the tenant or tenants of said housing accommodations on and after July 1, 1945 all amounts received from said tenant or tenants as rent for said housing accommodations in excess of the maximum

rent thereof prior to July 1, 1944.

"3. Judgment against the defendant in the amount of

\$78.00 together with the costs of this suit.

"4. Such other, further and different relief as the

court may deem just and proper."

If we understand defendant's main contention correctly, it makes no sense that plaintiff was not entitled to the relief sought under count one. He states: "Count one of the complaint was filed pursuant to Section 202 (a) of the Act for injunctive relief and under that section of the Act the court may grant a temporary or final restraining order without bond. The relief under that section is injunctive only and is in chambers."

He claims, however, that count two of the complaint was filed pursuant to Section 202 (a) of the Act and that the proceeding

brought under that count is purely an action at law; that "no equitable relief is permissible and when a defendant is sued under this section he has a right to a trial by a jury"; that neither section 205 (a) nor 205 (e) of the Act grants the court the right to order restitution of overcharges to a tenant not a party to the suit. It must be conceded that at the time that oral arguments were heard in this court upon the instant appeal there was considerable doubt as to how defendant's contention should be decided. In Bowles v. Skaggs, 151 F. 2d 817 (decided by the Circuit Court of Appeals, Sixth Circuit, November 12, 1945), the court had before it the question as to the power of a court of equity to compel restitution under section 205 (a) of the Emergency Price Control Act. In its opinion the court states (pp. 819, 820, 821):

"The principal question in the case requires a construction of Sec. 205(a) of the Act. * * * It will be noted that the Administrator may make application to the court 'for an order enjoining such acts or practices,' or 'for an order enforcing compliance with such provision.' It will also be noted that the court is thereby empowered to grant 'a permanent or temporary injunction, restraining order, or other order.' No consideration appears to have been given to the phrase 'or for an order enforcing compliance with such provision.' It would appear to be somewhat difficult to exclude from the scope of orders enforcing compliance, an order that compels restitution to a purchaser of the excess of a sale over a ceiling price. Such an order would seem to be, in final analysis, an order enforcing compliance even though less effective, perhaps, as a deterrent than the provisions of Sec. 205(e) which give to the buyer, under certain circumstances, a right of action for treble the amount by which the consideration exceeds the applicable maximum price.

"The controversy concerns itself mainly, however, with

brought under that court is purely an action at law; that "no equitable relief is permissible and when a defendant is sued under this section he has a right to a trial by a jury"; that neither section 205 (a) nor 205 (e) of the Act grants the court the right to order restitution of overcharges to a defendant not a party to the suit. It must be conceded that at the time that oral arguments were heard in this court upon the instant appeal there was considerable doubt as to how defendant's contention should be decided. In Colles v. Army & Navy, 171 F. 2d 217 (decided by the Circuit Court of Appeals, sixth circuit, November 11, 1947), the court had before it the question as to the power of a court of equity to compel restitution under section 205 (a) of the Emergency Price Control Act. In its opinion the court states (pp. 217, 220, 221): "The principal question in the case requires a construction of sec. 205(a) of the Act. * * * It will be noted that the Administrator may make application to the court 'for an order enjoining such acts or practices,' or 'for an order enforcing compliance with such provision.' It will also be noted that the court is thereby empowered to grant 'a permanent or temporary injunction, restraining order, or other order.' For consideration appears to have been given to the phrase 'for an order enforcing compliance with such provision.' It would appear to be somewhat difficult to exclude from the scope of orders enforcing compliance, an order that compels restitution to a purchaser of the excess of a sale over a ceiling price. Such an order would seem to be, in itself, an order enforcing compliance even though less effective, perhaps, as a deterrent than the provisions of sec. 205(a) which give to the buyer, under certain circumstances, a right of action for treble the amount by which the consideration exceeds the applicable maximum price.

"The controversy concerns itself mainly, however, with

the construction to be placed upon the phrase 'or other order' in the last line of Sec. 205(a). The appellee urges, and its argument prevailed, that only such orders are within the connotation of the phrase as are needed to make the injunction order practicable and understandable in its application. This contention would seem to be tenuous. Certainly were the phrase entirely eliminated one could hardly deny the power of the court to amend and clarify an injunctive order which concededly it has power to grant, nor to punish for contempt because of its violation. Nothing in the section contained, were such phrase omitted, would seem to confine the court to the original form or content of the injunction or restraining order, or to support an inference that having once granted it, the power is at an end however ineffective, impracticable and ambiguous the original order might prove to be. Manifestly, then, the phrase 'or other order' must have broader significance than contended.

"It is undoubtedly within the power of equity courts to mould their remedies to the needs of particular situations, and nothing in the section indicates the intent of the Congress to restrict such powers. Injunctions are, of course, most commonly prohibitory, and such injunctions operate in futuro, but equity courts have, from early times, when equitable considerations have required the restoration of a status quo, issued mandatory injunctions or granted other affirmative relief responsive to the needs of parties invoking equity. Certainly the public interest involved does not compel a limitation upon the normal and historical power of equity. Hecht Co. v. Bowles, Adm'r, 321 U. S. 321, 64 S. Ct. 587, 88 L. Ed. 754. There it was said, page 330 of 321 U. S., page 592 of 63 S. Ct., 88 L. Ed. 754, 'It is therefore even more compelling to conclude that, if Congress desired to make such

the construction to be placed upon the phrase 'or other order' in the last line of Sec. 205(a). The appellee argues, and its argument prevailed, that only such orders are within the connection of the phrase as are needed to make the injunction order practicable and understandable in its application. This contention would seem to be tenuous. Certainly were the phrase entirely eliminated one could hardly deny the power of the court to amend and clarify an injunctive order which concededly it has power to grant, nor to punish for contempt because of its violation. Nothing in the section contained, were such phrase omitted, would seem to confine the court to the original form or content of the injunction or restraining order, or to support an inference that having once granted it, the power is at an end however ineffective, impracticable and ambiguous the original order might prove to be. Manifestly, then, the phrase 'or other order' must have broader significance than contended.

"It is undoubtedly within the power of equity courts to mould their remedies to the needs of particular situations, and nothing in the section indicates the intent of the Congress to restrict such powers. Injunctions are, of course, most commonly prohibitory, and such injunctions operate in futuro, but equity courts have, from early times, when equitable considerations have required the restoration of a status quo, issued mandatory injunctions or granted other affirmative relief responsive to the needs of parties involving equity. Certainly the public interest involved does not compel a limitation upon the normal and historical power of equity. Hecht Co. v. Reliance, 321 U. S. 321, 64 S. Ct. 587, 68 L. Ed. 754. There it was said, page 330 of 321 U. S., page 592 of 63 S. Ct., 68 L. Ed. 754, 'it is therefore even more compelling to conclude that, if Congress desired to make such

abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.' This was in reference to a contention that the district court had no discretion as to whether or not to issue an injunction but was required to do so if the proper facts were established. The court resolved the ambiguities of Sec. 205(a) 'in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. United States v. Morgan, 307 U. S. 183, 194, 59 S. Ct. 795, 801, 83 L. Ed. 1211, and cases cited.' The fact that the court pointed to a type of order as within the connotation of 'other order,' does not support an inference that the inclusion of the one necessarily excludes all others.

"* * *

"* * * To deny to the Administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only practical remedy, would be to subvert the purposes of the Act."

On October 31, 1945, the United States Circuit Court of Appeals, Eighth Circuit, in Bowles v. Warner Holding Co., 151 F. 2d 529, filed an opinion that conflicts with the opinion filed in the Skaggs case. The plaintiff in the Warner Holding Co. case applied to the Supreme Court of the United States for a writ of certiorari, which was granted, and on June 3, 1946, the latter court filed an opinion in Porter v. Warner Holding Company in which the ruling of the Circuit Court of Appeals for the Eighth Circuit was overruled and the ruling made by the Circuit Court of Appeals for the Sixth Circuit in the Skaggs case was sustained. In its opinion the court states:

"It is readily apparent from the foregoing that a decree

should depart from traditional equity practices as is suggested, it would have made its basic claim. This was in response to a contention that the district court had no discretion as to whether or not to issue an injunction but was required to do so if the proper facts were established. The court resolved the ambiguity of Sec. 202(a) 'in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. United States v. Warner Holding Co., 357 U.S. 229, 1948, 80 L. Ed. 111, and cases cited. The fact that the court pointed to a type of order as within the connotation of 'other order', does not support an inference that the inclusion of the one necessarily excludes all others.

"** * to deny to the administrator power to act in cases where, as here, restitution rather than a prohibitory injunction is the only practical remedy, would be to subvert the purposes of the Act."

On October 31, 1947, the United States Circuit Court of Appeals, Eighth Circuit, in Porter v. Warner Holding Co., 157 F. 2d 529, filed an opinion that conflicts with the opinion filed in the Warner case. The plaintiff in the Warner Holding Co. case applied to the Supreme Court of the United States for a writ of certiorari, which was granted, and on June 3, 1948, the latter court filed an opinion in Porter v. Warner Holding Company in which the ruling of the Circuit Court of Appeals for the Eighth Circuit was overruled and the ruling made by the Circuit Court of Appeals for the Ninth Circuit in the Warner case was sustained. In its opinion the court states: "It is readily apparent from the foregoing that a decree

compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under Sec. 205(a). Indeed, the language of Sec. 205(a) admits of no other conclusion. It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant 'a permanent or temporary injunction, restraining order, or other order.' As recognized in Hecht Co. v. Bowles, supra, 328 [321 U. S. 321], the term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion. An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:

"(1) It may be considered as an equitable adjunct to an injunction decree. * * *" This opinion determines defendant's contention, and adversely to him.

The point made by defendant that count two involves an action at law and therefore he had a right to have the issues raised under that count tried by a jury, in accordance with his demand, is also disposed of by the Supreme Court of the United States, in that case, for in its opinion it holds that an action to compel a landlord to disgorge rents acquired in violation of the Emergency Price Control Act is an equitable proceeding and that an order for the recovery and restitution of illegal rents "may be considered as an equitable adjunct to an injunction decree." (Italics ours.) But even if we assume that defendant had a right to have the issues raised by count two passed upon by a jury, if he insisted upon such a trial,

compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act may properly be entered by a District Court once its equity jurisdiction has been invoked under Sec. 205(a). Indeed, the language of Sec. 205(a) admits of no other conclusion. It expressly envisages applications by the Administrator for orders enjoining violations of the Act and for orders enforcing compliance with the Act; and it expressly authorizes the District Court, upon a proper showing, to grant a permanent or temporary injunction, restraining order, or other order. As recognized in Long Co. v. Fowler, 328 U.S. 2, [321], the term 'other order' contemplates a remedy other than that of an injunction or restraining order, a remedy noted in the exercise of the District Court's equitable discretion. An order for the recovery and restitution of illegal rents may be considered a proper 'other order' on either of two theories:

"(1) It may be considered as an equitable adjunct to an injunction decree. * * * This opinion determines defendant's contention, and adversely to him. The point made by defendant that count two involves an action at law and therefore he had a right to have the issues raised under that count tried by a jury, in accordance with his demand, is also disposed of by the Supreme Court of the United States, in that case, for in its opinion it holds that an action to compel a landlord to disgorge rents acquired in violation of the Emergency Price Control Act is an equitable proceeding and that an order for the recovery and restitution of illegal rents "may be considered as an equitable adjunct to an injunction decree." (Italics ours.) But even if we assume that defendant had a right to have the issues raised by count two passed upon by a jury, if he insisted upon such a trial,

nevertheless, the record fails to show that he was deprived, against his will, of that right. While it is true that sometime before the trial of the cause defendant filed a written demand for a trial by jury, we must presume, under the record before us, that he proceeded to trial by the court without objection; that he, acting as his own attorney, participated in the trial and testified in his own behalf; that he offered other evidence, "oral, written and documentary"; that he informed the trial court that he had no further evidence to present, and that he then took part in the arguments. There is nothing in the long judgment order entered by the court to indicate that he made any objection to the method of the trial, and it is significant, as plaintiff argues, that defendant did not see fit to file a transcript of the proceedings in the case. There is force in plaintiff's argument that defendant gambled upon a trial by the court, and, having lost, he now seeks to revive his written demand for a trial by jury that was plainly not insisted upon nor referred to at the time of the trial. That a party by his conduct may waive his right to a jury trial is settled law. In People v. Czaszewicz, 295 Ill. 11, the Supreme court states (pp. 15, 16): "A mandamus proceeding is an action at law and the parties to it have the right to have the issues of fact tried by a jury. But this right may be waived. Such waiver need not be expressly stated but is implied if the parties proceed with the trial before the court without objection. In Washington v. Louisville and Nashville Railway Co., 136 Ill. 49, (an action of trespass on the case,) the court heard evidence in the form of affidavits in regard to the execution of an agreement for settlement after suit was begun and fraud in procuring it and entered judgment in accordance with its terms. The plaintiff insisted that she had been deprived of her right to a trial by jury of the controverted fact in regard to the validity of the agreement, but it was

nevertheless, the record fails to show that he was removed, against his will, of that right. While it is true that a settlement before the trial of the case defendant filed a written demand for a trial by jury, we must presume, under the record before us, that he proceeded to trial by the court without objection that he, acting as his own attorney, participated in the trial and testified in his own behalf; that he offered other evidence, "oral, written and documentary"; that he informed the trial court that he had no further evidence to present, and that he then took part in the arguments. There is nothing in the long judgment order entered by the court to indicate that he made any objection to the method of the trial, and it is significant, as plaintiff argues, that defendant did not see fit to file a transcript of the proceedings in the case. There is force in plaintiff's argument that defendant handled upon a trial by the court, and, having lost, he now seeks to revive his written demand for a trial by jury that was plainly not insisted upon not referred to at the time of the trial. That a party by his conduct may waive his right to a jury trial is settled law. In People v. Garza, 205 Ill. 11, the supreme court states (pp. 15, 16): "A mandatory proceeding is an action at law and the parties to it have the right to have the issues of fact tried by a jury. But this right may be waived. Such waiver need not be expressly stated but is implied if the parties proceed with the trial before the court without objection. In Washington v. Louisville and Nashville Railway Co., 136 Ill. 47, (an action of trespass on the case,) the court heard evidence in the form of affidavits in regard to the execution of an agreement for settlement after suit was begun and found in proceeding it and entered judgment in accordance with its terms. The plaintiff insisted that she had been deprived of her right to a trial by jury of the controverted fact in regard to the validity of the agreement, but it was

held that since she stood by and participated in the proceeding without objection, making no motion for a jury trial or suggestion that she was entitled to one, she could not be heard to complain for the first time in the Appellate Court. In Heacock v. Hosmer, 109 Ill. 245, (a proceeding under the Burnt Records act,) a decree was rendered against the defendant upon overruling her demurrer to the petition, and she insisted that the law was unconstitutional because it deprived parties of a trial by jury. It was held that she was not in a position to raise this question because she did not ask for a jury in the circuit court, and as no jury was demanded the right of trial by jury was waived. These cases are not decisive of the question here, but the view expressed is in accordance with that of the Supreme Court of the United States in Phillips v. Preston, 5 How. 278, and Kearney v. Case, 12 Wall. 275, where the question was decided. In the latter case there was no express statement that the parties waived a jury, the language of the judgment showing that the cause came on for trial, certain counsel appeared for the plaintiff and certain other counsel for the defendants, and after hearing the pleadings, evidence and argument the court entered judgment. The court, citing Phillips v. Preston, *supra*, said that 'it is almost a necessary inference where a party is present by counsel and goes to trial before the court without objection or exception he has voluntarily waived his right to a jury and must be held in this court to the legal consequences of such a waiver.'" Many other cases to the same effect might be cited if it were necessary. The cases cited by defendant in support of his contention have no application to the instant proceedings, upon the facts. We are satisfied that the instant contention of defendant is a mere afterthought and that at the time of the trial he was willing to have the trial court pass upon the issues raised by count two. Defendant raises several technical points, but we find no merit in them. The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

held that since she stood by and participated in the proceeding without objection, making no motion for a jury trial or suggestion that she was entitled to one, she could not be heard to complain for the first time in the appellate court. In Hessock v. Hessock, 109 Ill. 245, (a proceeding under the Court Records Act,) a decree was rendered against the defendant upon overruling her demurrer to the petition, and she insisted that the law was unconstitutional because it deprived parties of a trial by jury. It was held that she was not in position to raise this question because she did not ask for a jury in the circuit court, and as no jury was demanded the right of trial by jury was waived. These cases are not decisive of the question here, but the view expressed is in accordance with that of the Supreme Court of the United States in Phillips v. Preston, 7 How. 278, and Kearney v. Case, 12 Wall. 277, where the question was decided. In the latter case there was no express statement that the parties waived a jury, the language of the judgment showing that the case came on for trial, certain counsel appeared for the plaintiff and certain other counsel for the defendants, and after hearing the pleadings, evidence and argument the court entered judgment. The court, citing Phillips v. Preston, supra, said that "it is almost a necessary inference where a party is present by counsel and goes to trial before the court without objection or exception he has voluntarily waived his right to a jury and must be held in this court to the legal consequences of such a waiver." Many other cases to the same effect might be cited if it were necessary. The cases cited by defendant in support of his contention have no application to the instant proceedings, upon the facts. He are entitled that the instant contention of defendant is a mere afterthought and that at the time of the trial he was willing to have the trial court pass upon the issues raised by count two. Defendant raises several technical points, but we find no merit in them. The judgment of the circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

William, J., and Friend, J., concur.

43657

329 I.A. 242

CLARA MARY AHLSTRAND,
Appellee,

v.

OLAF ALBIN AHLSTRAND,
Appellant.

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On July 12, 1945, a decree for separate maintenance was entered in favor of plaintiff and the counterclaim of defendant for divorce upon the grounds of extreme and repeated cruelty was dismissed. The custody of two minor children was awarded to plaintiff. Defendant was ordered to pay plaintiff the sum of \$200 per month for the support and maintenance of herself and the children and that he should also pay certain sums to plaintiff for her attorney's fees, for the services of a court reporter, and court costs. On September 19, 1945, plaintiff filed a petition for a rule upon defendant to show cause why he should not be punished for contempt of court for his neglect and refusal to comply with the provisions of the decree. The petition alleged that defendant was then in arrears in the total sum of \$765.15 and that although he was well able to pay the same he had wilfully neglected and refused to do so. On the same day an order was entered ~~in~~ directing defendant to show cause by October 19, 1945, why he should not be held in contempt of court, and he was ordered to answer the petition within ten days. Defendant filed a verified answer to plaintiff's petition. For the purposes of this appeal it is only necessary to refer to an affirmative defense interposed by defendant in his answer. Therein he alleges that on August 12, 1945, "after constant implorations, the petitioner resumed cohabitation with the respondent and they lived and cohabited happily together at their summer home with

3291A 242

43627

APPEAL FROM SUPERIOR

COURT OF COOK COUNTY.

CLARA MARY WILSTAND,
Appellee,

v.

OLAF ALVIN WILSTAND,
Appellant.

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

On July 12, 1945, a decree for separate maintenance

was entered in favor of plaintiff and the counterclaim of

defendant for divorce upon the grounds of extreme and re-

peated cruelty was dismissed. The custody of two minor

children was awarded to plaintiff. Defendant was ordered

to pay plaintiff the sum of \$200 per month for the support

and maintenance of herself and the children and that he

should also pay certain sums to plaintiff for her attorney's

fees, for the services of a court reporter, and court costs.

On September 19, 1945, plaintiff filed a petition for a rule

upon defendant to show cause why he should not be punished

for contempt of court for his neglect and refusal to comply

with the provisions of the decree. The petition alleged that

defendant was then in arrears in the total sum of \$765.15 and

that although he was well able to pay the same he had willfully

neglected and refused to do so. On the same day an order was

entered directing defendant to show cause by October 19, 1945,

why he should not be held in contempt of court, and he was order-

ed to answer the petition within ten days. Defendant filed a

verified answer to plaintiff's petition. For the purposes of

this appeal it is only necessary to refer to an affirmative

denial interposed by defendant in his answer. Therein he

alleges that on August 12, 1945, "after constant importations,

the petitioner behaved cohabitation with the respondent and they

lived and cohabited happily together at their summer home with

their two minor children at Paddock Lake, Wisconsin, until the second day of September, 1945"; that on that date plaintiff and defendant returned to their home in Chicago and about midnight of the same date, for no apparent or logical reason whatsoever, plaintiff told defendant that her lawyers had advised her that resumption of cohabitation with defendant had rendered the decretal order null and void and she ordered defendant to leave his abode, and, under threats of physical injury to his person, he had no alternative but to leave his home; that again on the same day he cohabited and had marital relationships with plaintiff and again he offered to remain permanently with her, but she stated that she could not do this, upon the advice of her attorneys; that defendant has continuously importuned plaintiff to resume normal cohabitation with him and "to make a much needed home for themselves and their two small children," but plaintiff has refused and still continues to refuse to do so, under the advice of counsel. The answer further alleges that the decretal order entered in this cause had been vacated by operation of law and the same is null and void. No reply was filed to defendant's answer, nor was there any motion made by plaintiff in reference to the same until the hearing.

The report of proceedings in the instant cause consists mainly of colloquies between the counsel and the court, and it is plain that the hearing upon plaintiff's petition was not an orderly proceeding. After a careful study of the transcript we ascertain the following facts: Defendant's counsel called the attention of the court to the fact that there was no pleading on file denying or attacking the affirmative allegations stated in defendant's answer and he insisted that in that state of the record the allegations were admitted, and that, therefore, the decree entered was null and void and of no effect, and he moved

their two minor children at Badcock Lake, Wisconsin, until the second day of September, 1947; that on that date plaintiff and defendant returned to their home in Chicago and about midnight of the same date, for no apparent or logical reason whatsoever, plaintiff told defendant that her lawyers had advised her that resumption of cohabitation with defendant had rendered the decretal order null and void and she ordered defendant to leave his abode, and, under threats of physical injury to his person, he had no alternative but to leave his home; that again on the same day he cohabited and had marital relationships with plaintiff and again he offered to remain permanently with her, but she stated that she could not do this, upon the advice of her attorneys; that defendant has continuously importuned plaintiff to resume normal cohabitation with him and "to make a much needed home for themselves and their two small children," but plaintiff has refused and still continues to refuse to do so, under the advice of counsel. The answer further alleges that the decretal order entered in this cause had been vacated by operation of law and the same is null and void. No reply was filed to defendant's answer, nor was there any motion made by plaintiff in reference to the same until the hearing.

The report of proceedings in the instant cause consists mainly of colloquies between the counsel and the court, and it is plain that the hearing upon plaintiff's petition was not an orderly proceeding. After a careful study of the transcript we ascertain the following facts: Defendant's counsel called the attention of the court to the fact that there was no pleading on file denying or attacking the affirmative allegations stated in defendant's answer and he insisted that in that state of the record the allegations were admitted, and that, therefore, the decree entered was null and void and of no effect, and he moved

that the decree be summarily vacated "as being null and void at this time." Plaintiff's counsel argued that the court had no power to grant such a motion; that defendant had had an opportunity to take the case to the Appellate court but that he did not do so; that "now he is attempting by this move to void the terms of the decree and order of July 12, 1945." The following then occurred: "The Court: He has alleged in his answer that the parties have resumed marital relations. Mr. Clininn [attorney for plaintiff]: We deny that and can prove that such statements are utterly false. The Court: He has made a request for a hearing as to the validity of the decree. I cannot deny that request for such hearing and the introduction of testimony." Plaintiff's counsel then argued that the payment of money due under the decree could not be voided by the allegations that the parties had resumed marital relations and he moved the court to strike the answer of defendant, and thereupon the court struck the answer from the files. Defendant's counsel then stated that defendant would stand upon his answer. Thereupon plaintiff was called to the stand and she testified, in substance, over the objection of defendant, that the total amount due her from defendant, under the decree, was \$1,350. The court then denied a motion, made by counsel for defendant, to strike the testimony of plaintiff. The contempt order was then entered by the court.

Defendant contends, inter alia, that all of the affirmative allegations in the answer of defendant were admitted by plaintiff's failure to reply to the answer, and he further contends that "the resumption of cohabitation and marital relations automatically abrogates a decree for separate maintenance," and that the order for the payment of alimony, etc., included in the decree thereby became void. This last contention must be sustained. The court

that the decree be summarily vacated "as being null and void at this time." Plaintiff's counsel argued that the court had no power to grant such a motion; that defendant had had an opportunity to take the case to the appellate court but that he did not do so; that "now he is attempting by this move to void the terms of the decree and order of July 12, 1947." The following then occurred: "The Court: He has alleged in his answer that the parties have resumed marital relations. Mr. Clinch [attorney for plaintiff]: We deny that and can prove that such statements are utterly false. The Court: He has made a request for a hearing as to the validity of the decree. I cannot deny that request for such hearing and the introduction of testimony." Plaintiff's counsel then argued that the payment of money due under the decree could not be voided by the allegations that the parties had resumed marital relations and he moved the court to strike the answer of defendant, and thereupon the court struck the answer from the files. Defendant's counsel then stated that defendant would stand upon his answer. Thereupon plaintiff was called to the stand and she testified, in substance, over the objection of defendant, that the total amount due her from defendant, under the decree, was \$1,350. The court then denied a motion, made by counsel for defendant, to strike the testimony of plaintiff. The contempt order was then entered by the court.

Defendant contends, inter alia, that all of the affirmative allegations in the answer of defendant were admitted by plaintiff's failure to reply to the answer, and he further contends that "the resumption of cohabitation and marital relations automatically obviates a decree for separate maintenance," and that the order for the payment of alimony, etc., included in the decree thereby became void. This last contention must be sustained. The court

in Newman v. Newman, 240 Ill. App. 193, passed upon a like contention and held that where following the entry of a decree for separate maintenance the parties resumed marital relations and lived together as husband and wife for a period of three months, and there was no evidence to show that the reconciliation was not genuine and in good faith, the decree was abrogated by the act of resuming relations; that where following the entry of a decree for separate maintenance the parties abrogate the decree by resuming matrimonial relations, an order for the payment of alimony included in such decree thereby becomes void. The Supreme court in Van Dolman v. Van Dolman, 378 Ill. 98, 104, held: "A reconciliation and resumption of marriage relations after a decree in separate maintenance, abrogates the decree," and Newman v. Newman, *supra*, is cited in support of this statement of the law. Defendant asks us to reverse the contempt order entered against him, without remanding the cause, upon the ground that the affirmative allegations in his answer as to the resumption of cohabitation and marital relations must be taken as true, as plaintiff failed to reply to the same. We believe, however, in view of the confused nature of the proceedings in the trial court, that justice will be best served by allowing plaintiff an opportunity to deny the said allegations. The transcript shows that during the proceedings she cried out that defendant's allegations in reference to the resumption of the marital relations were false. If she files a reply and denies the allegations the trial court should then proceed to hear and determine the issue. If the trial court finds that defendant has proved the allegations in his answer by a preponderance of the evidence the decree of separate maintenance and the order for the payment of alimony included therein would thereby become void. If, on the other hand, the trial court finds

in Newman v. Newman, 240 Ill. App. 192, passed upon a like contention and held that where following the entry of a decree for separate maintenance the parties resumed marital relations and lived together as husband and wife for a period of three months, and there was no evidence to show that the reconciliation was not genuine and in good faith, the decree was annulled by the act of resuming relations; that where following the entry of a decree for separate maintenance the parties annul the decree by resuming marital relations, an order for the payment of alimony included in such decree thereby becomes void. The Supreme Court in Van Dolan v. Van Dolan, 178 Ill. 98, 104, held: "A reconciliation and resumption of marital relations after a decree in separate maintenance, annuls the decree," and Newman v. Newman, supra, is cited in support of this statement of the law. Defendant asks us to reverse the contempt order entered against him, without remanding the cause, upon the ground that the affirmative allegations in his answer as to the resumption of cohabitation and marital relations must be taken as true, as plaintiff failed to reply to the same. We believe, however, in view of the confused nature of the proceedings in the trial court, that justice will be best served by allowing plaintiff an opportunity to deny the said allegations. The transcript shows that during the proceedings she cried out that defendant's allegations in reference to the resumption of the marital relations were false. If she files a reply and denies the allegations the trial court should then proceed to hear and determine the issue. If the trial court finds that defendant has proved the allegations in his answer by a preponderance of the evidence the decree of separate maintenance and the order for the payment of alimony included therein would thereby become void. If, on the other hand, the trial court finds

-5-

that the allegations of defendant have not been proven by a preponderance of the evidence, it can then proceed to a hearing and determination of the merits of plaintiff's petition for a rule to show cause.

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions.

JUDGMENT REVERSED, AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Friend, J., concur.

that the allegations of defendant have not been proven by a preponderance of the evidence, it can then proceed to a hearing and determination of the merits of plaintiff's petition for a wife to show cause.

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions.

JUDGMENT REVERSED, AND CAUSE
REMAINED WITH DIRECTIONS.

Sullivan, P. J., and Trembly, J., concur.

43669

IN THE MATTER OF THE ESTATE OF
JOHN I. NELSON, Incompetent.

AUGUSTUS L. WILLIAMS and JOHN
D. VOSNOS,
Appellees.

SARITA E. NELSON, Conservatrix
of the Estate of John I. Nelson,
Incompetent,
Appellant.

329 I.A. 243

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

416

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

From a judgment order of the Circuit court of Cook county that John D. Vosnos and Augustus L. Williams recover from the estate of John I. Nelson, Incompetent, the sum of \$2,250, Sarita E. Nelson, conservatrix of said estate, appeals.

On April 24, 1945, the following claim was filed in the Probate court of Cook county:

"In the Matter of the Estate of)
JOHN I. NELSON,)
Incompetent)

"A. L. Williams being first duly sworn says that he has knowledge of the facts herein set forth, that the annexed claim against the above named estate is just and unpaid after allowing all just credits, deductions, and set-offs, and that claimant has no other claim against said estate. Claim is for attorney fees for legal services rendered at the request of and on behalf of the said John I. Nelson, in the matter of securing his discharge from the Chicago State Hospital for the Insane in a Writ of Habeas Corpus Proceeding, February 26, 1945.

"Subscribed and sworn to before me
this 28th day of February 1945.

"A. L. Williams

"Frank Lyman
"Clerk of the Probate Court
"Notary Public"

ପଦ୍ମ ୫

JOHN I. NELSON, Inoc. Defect.

Appellées.

Appellant,
Incompetent,
of the Estate of John I. Nelson,
SARITA E. NELSON, Conservatrix

MR. JUSTICE SCALIA DELIVERED THE OPINION OF THE COURT.

On April 24, 1945, the following claim was filed in S. 270, Satira E. Nelson, conservatrix of said estate, appeals from the estate of John I. Nelson, incompetent, the sum of county that John D. Vosnos and Augustus L. Williams recover from a judgment order of the Circuit Court of Cook

JOHN I. WILSON,
Independent

"A. L. Williams being first duly sworn says that he has knowledge of the facts herein set forth, that the annexed claim against the above named estate is just and unpaid after allowing all just credits, deductions, and set-offs, and that claimant has no other claim against said estate. Claim is for attorney fees for legal services rendered at the request of and on behalf of the said John I. Nelson, in the matter of securing his discharge from the Chicago State Hospital for the insane in a writ of Habeas Corpus proceeding, February 26, 1945.

"Subscribed and sworn to before me this 28th day of February 1945.

"A. L. Williams

"Frank Lyman
"Clerk of the Probate Court
"Notary Public"

Upon the same date Augustus L. Williams and John D. Vosnos filed a petition in that court alleging, in substance, that they are duly licensed and practicing attorneys; that John I. Nelson and Sarita E. Nelson are husband and wife and are residents of Tupelo, Mississippi; that on January 29, 1945, Nelson, a successful practitioner of dentistry in Mississippi, came to Chicago to attend to certain business affairs; that he became involved in a dispute concerning his business affairs with his wife and Macon H. Huggins, his cousin, an attorney; that on February 8, 1945, Nelson was committed to the Chicago State Hospital for the Insane and his wife was appointed "conservator" of his estate; that about February 10, 1945, a minister, and friend of Nelson since his boyhood, visited Nelson at the said hospital and Nelson complained to the minister that he was not insane and urged the minister to secure the services of an attorney and authorized the minister to employ an attorney and to offer the attorney \$5,000 and expenses for securing his discharge from the hospital, and for said minister to bring the attorney to the institution to confer with him; that on February 13, 1945, Williams, in company with said minister, visited Nelson at the hospital and Nelson confirmed the employment of Williams as his attorney to prosecute a writ of habeas corpus to obtain his release, and Nelson also executed a power of attorney appointing Williams to act in his stead and behalf in all matters; that Nelson then appeared to Williams to be in full possession of his mental faculties; that on February 16, 1945, Williams found it necessary to employ an additional attorney and John D. Vosnos became associate counsel at the request of Williams; that on the same date petitioners, Williams and Vosnos, filed a writ of habeas corpus in behalf of Nelson before Judge Dunne in the Circuit court of Cook county, who issued a writ of habeas corpus returnable forthwith; that on the same date there was a hearing in the matter of the writ before Judge Dunne and certain testimony was

Upon the same date Augustus L. Williams and John D.

Vosnes filed a petition in that court alleging, in substance,

that they are duly licensed and practicing attorneys; that John

I. Nelson and Gertrude E. Nelson are husband and wife and are

residents of Toledo, Mississippi; that on January 29, 1945, Nelson,

a successful practitioner of dentistry in Mississippi, came to

Chicago to attend to certain business affairs; that he became in-

involved in a dispute concerning his business affairs with his wife

and Macon H. Higgins, his cousin, an attorney; that on February 8,

1945, Nelson was committed to the Chicago State Hospital for the

In sane and his wife was appointed "conservator" of his estate;

that about February 10, 1945, a minister, and friend of Nelson

since his boyhood, visited Nelson at the said hospital and Nelson

complained to the minister that he was not insane and urged the

minister to secure the services of an attorney and authorized the

minister to employ an attorney and to offer the attorney \$5,000

and expenses for securing his discharge from the hospital, and for

said minister to bring the attorney to the institution to confer

with him; that on February 13, 1945, Williams, in company with said

minister, visited Nelson at the hospital and Nelson confirmed the

employment of Williams as his attorney to prosecute a writ of

habeas corpus to obtain his release, and Nelson also executed a

power of attorney appointing Williams to act in his stead and behalf

in all matters; that Nelson then appeared to Williams to be in full

possession of his mental faculties; that on February 16, 1945,

Williams found it necessary to employ an additional attorney and

John D. Vosnes became associate counsel at the request of Williams;

that on the same date petitioners, Williams and Vosnes, filed a writ

of habeas corpus in behalf of Nelson before Judge Dunn in the

Circuit Court of Cook County, who issued a writ of habeas corpus

returnable forthwith; that on the same date there was a hearing in

the matter of the writ before Judge Dunn and certain testimony as

heard; that on February 23, 1945, two expert psychiatrists testified before the court and on February 26, 1945, Judge Dunne entered an order declaring Nelson to be sane and directing his discharge from the said hospital; that on February 13, 1945, Nelson again agreed to pay petitioners the sum of \$5,000 as attorneys' fees in the matter of securing his discharge from the said hospital, and also agreed to pay them a sum equal to the amount advanced as necessary costs of the prosecution of said writ, and that on February 16, 1945, Nelson testified before Judge Dunne that he had employed petitioners as his attorneys in the matter of the writ; "that the necessary expenses and costs incurred in the prosecution of the said writ are as follows:

1. To Dr. A. S. Hershfield	\$150.00
2. Long Distance telephone calls .	15.00
3. 6 automobile trips to hospital .	40.00
4. Certified copies of orders . .	10.00
5. Necessary investigation	<u>35.00</u>

"Total \$250.00";

that petitioners have been informed that Nelson and his wife have left Illinois and are now residing in Tupelo, Mississippi; that immediately after the order of discharge was entered Nelson was prevailed upon by his wife and Macon H. Huggins, "attorney for conservator," and others, not to confer with them and that from that time to the present petitioners have been unable to confer with Nelson, and they believe that a conspiracy was entered into to take Nelson out of the State of Illinois and into Mississippi, where he now resides; that within three weeks after February 26, 1945, under the rules and regulations of the Department of Public Welfare of the State of Illinois, Nelson would have been deported to the State of Mississippi as an insane person had he not been discharged by Judge Dunne; that petitioners are informed that the estate of Nelson is valued at \$75,000 and upwards and they allege that Nelson personally, and now his estate, is in-

heard; that on February 23, 1945, two expert psychiatrists testified before the court and on February 26, 1945, Judge Dunne entered an order declaring Nelson to be sane and directing his discharge from the said hospital; that on February 13, 1945, Nelson again agreed to pay petitioners the sum of \$2,000 as attorneys' fees in the matter of securing his discharge from the said hospital, and also agreed to pay them a sum equal to the amount advanced as necessary costs of the prosecution of said writ, and that on February 16, 1945, Nelson testified before Judge Dunne that he had employed petitioners as his attorneys in the matter of the writ; "that the necessary expenses and costs incurred in the prosecution of the said writ are as follows:

- 1. To Dr. A. S. Herschfeld . . . \$150.00
- 2. Long distance telephone calls . . . 15.00
- 3. Automobile trips to hospital . . . 40.00
- 4. Certified copies of orders . . . 10.00
- 5. Necessary investigation . . . 25.00

"Total

\$250.00";

that petitioners have been informed that Nelson and his wife have left Illinois and are now residing in Toledo, Mississippi; that immediately after the order of discharge was entered Nelson was prevailed upon by his wife and Mason H. Higgins, "attorney for conservator," and others, not to confer with them and that from that time to the present petitioners have been unable to confer with Nelson, and they believe that a conspiracy was entered into to take Nelson out of the State of Illinois and into Mississippi, where he now resides; that within three weeks after February 26, 1945, under the rules and regulations of the Department of Public Safety of the State of Illinois, Nelson would have been deported to the State of Mississippi as an insane person had he not been discharged by Judge Dunne; that petitioners are informed that the estate of Nelson is valued at \$75,000 and upwards and they allege that Nelson personally, and now his estate, is in-

debted to them in the sum of \$5,250; that "your petitioners further represent that this court ^{has} jurisdiction to allow them the said claim, or in the alternative that the present conservatrix be removed so your petitioners can institute the necessary and proper legal proceedings in the proper court or courts in Cook County, so service can be had on a resident conservator and the subject matter hereof be properly adjudicated"; that petitioners allege that the contract of employment alleged in the petition was entered into at a time when Nelson had been legally adjudged incompetent, but that in truth and in fact he was sane; that said contract was ratified and confirmed by Nelson on the date of his discharge; that on said date Nelson set over and assigned to the petitioners the sum of \$5,250, payable out of the funds he "or his conservatrix have now and on deposit with the South East National Bank of Chicago." The petitioners pray that Sarita E. Nelson be removed as conservatrix and a resident conservator be appointed; that an order be entered allowing petitioners' claim and that the conservator to be appointed be directed to pay them the sum of \$5,250 in full settlement for legal services rendered in behalf of Nelson. Attached to the petition is an affidavit of Augustus L. Williams and John D. Vosnos in which they aver "that the facts stated therein are true in substance and in fact." The conservatrix filed her verified answer to the said petition. The answer is a lengthy one and it is only necessary to recite, in substance, certain parts of it. She avers that she never received any notice of the habeas corpus proceedings and that she had at no time engaged or authorized Williams to represent the incompetent in a habeas corpus proceeding or in any other proceeding; denies that it was necessary for Williams to file a writ of habeas corpus or to secure the assistance of Vosnos in any habeas corpus proceedings, and denies that the contract alleged in the petition was ever ratified or confirmed by said Nelson after his discharge; denies that

debited to them in the sum of \$2,250; that "your petitioners
has
further represent that this court has jurisdiction to allow them the
said claim, or in the alternative that the present conservatrix
be removed as your petitioners can institute the necessary and
proper legal proceedings in the proper court or courts in Cook
County, so service can be had on a resident conservator and the
subject matter hereof be properly adjudicated"; that petitioners
allege that the contract of employment alleged in the petition
was entered into at a time when Nelson had been legally adjudged
incompetent, but that in truth and in fact he was sane; that said
contract was ratified and confirmed by Nelson on the date of his
discharge; that on said date Nelson set over and assigned to the
petitioners the sum of \$2,250, payable out of the funds in "or
his conservatrix have now and on deposit with the South East
National Bank of Chicago." The petitioners pray that said B.
Nelson be removed as conservatrix and a resident conservator be
appointed; that an order be entered allowing petitioners' claim
and that the conservator to be appointed be directed to pay them
the sum of \$2,250 in full settlement for legal services rendered
in behalf of Nelson. Attached to the petition is an affidavit of
Augustus L. Williams and John D. Vonnor in which they aver "that
the facts stated therein are true in substance and in fact." The
conservatrix filed her verified answer to the said petition. The
answer is a lengthy one and it is only necessary to recite, in
substance, certain parts of it. She avers that she never received
any notice of the habes corpus proceedings and that she had at no
time engaged or authorized Williams to represent the incompetent in
the habes corpus proceeding or in any other proceeding; denies that
it was necessary for Williams to file a writ of habes corpus or to
secure the assistance of Vonnor in any habes corpus proceedings;
denies that the contract alleged in the petition was ever rat-
ified or confirmed by said Nelson after his discharge; denies that

Nelson was sane at the time the alleged contract was entered into and avers that he was insane at the time that he was incarcerated in the Chicago State Hospital for the Insane and that he is still insane and is now incarcerated in the Hospital for the Insane in the State of Mississippi; that two days after he was discharged by the Circuit court of Cook county in the habeas corpus proceedings he arrived in Tupelo, Mississippi, his old home, where he went into one of his fits of insanity and was examined by Dr. Cleveland of that city, who issued a certificate that Nelson should be adjudged a lunatic and committed to an insane hospital for treatment; that on February 28, 1945, a hearing was had in that city before the Chancery Court of Lee County, Mississippi, and a jury found that Nelson was of unsound mind ^{and} incapable of taking care of himself, and the order of said court Nelson was committed to the State Hospital of the State of Mississippi, where he is now incarcerated. A certified transcript of the record of the Chancery Court of County, Mississippi, is attached to the answer. The conservator further avers that Nelson was insane at the time that he was incarcerated in the Chicago State Hospital for the Insane and that he is still insane; that the alleged contract between her ward and Williams was void and illegal because of the incapacity of her ward to make a valid contract. Attached to the answer of the conservatrix is a certified copy of the judgment order of the County court of Cook county entered February 8, 1945, which recites, inter alia, that upon the duly verified petition of Sarita E. Nelson and the certificates of two physicians, S. A. Sugar and Clarence Neymann, and upon due notice the court heard the testimony of witnesses and examined the certificates of the said physicians, and found that John I. Nelson "is mentally ill; is now of unsound mind; is not capable of managing and caring

Nelson was sane at the time the alleged contract was entered into and over that he was insane at the time that he was incarcerated in the Chicago State Hospital for the Insane and that he is still insane and is now incarcerated in the Hospital for the Insane in the State of Mississippi; that two days after he was discharged by the Circuit Court of Cook County in the papers copies proceedings he arrived in Tupelo, Mississippi, his old home, where he went into one of his fits of insanity and was examined by Dr. Cleveland of that city, who issued a certificate that Nelson should be adjudged a lunatic and committed to an insane hospital for treatment; that on February 28, 1945, a hearing was had in that city before the Chancery Court of Lee County, Mississippi, and a jury found that Nelson was of unsound mind ^{and} incapable of taking care of himself, and the order of said court Nelson was committed to the State Hospital of the State of Mississippi, where he is now incarcerated. A certified transcript of the record of the Chancery Court of Lee County, Mississippi, is attached to the answer. The conservator further avers that Nelson was insane at the time that he was incarcerated in the Chicago State Hospital for the Insane and that he is still insane; that the alleged contract between her and Williams was void and illegal because of the incapacity of her ward to make a valid contract. Attached to the answer of the conservatrix is a certified copy of the judgment order of the County Court of Cook County entered February 8, 1945, which recites, *inter alia*, that upon the duly verified petition of Sarah M. Nelson and the certificates of two physicians, S. A. Mayer and Clarence Neymann, and upon due notice the court heard the testimony of witnesses and examined the certificates of said physicians, and found that John I. Nelson "is mentally ill; is now of unsound mind; is not capable of managing and caring

for his own estate; is dangerous to himself; is dangerous to others if permitted to go at large; is in such condition of mind or body as to be a fit subject for care and treatment in a hospital for mentally ill persons," and it was ordered and adjudged that Nelson be committed to the care and custody of the Department of Public Welfare for the State of Illinois, to the Chicago State Hospital, Dunning, Ill. The certified transcript of the record of the Chancery Court of Lee County, Mississippi, shows that after certain preliminary steps had been taken in that court a jury was called to inquire into the condition of mind of John Ira Nelson and that after a hearing the jury returned a verdict that Nelson "is of unsound mind and not capable of taking care of himself; and recommend that the said John Ira Nelson be committed to State Insane Hospital"; and that thereupon a writ issued commanding the sheriff of Lee County to arrest Nelson and place him in the Lunatic Asylum of the State.

Upon April 12, 1945, the claim of Williams came on for hearing before the Probate court of Cook county, at which time the following order was entered: "This cause coming on to be heard upon the claim of A. L. Williams and the removal of the conservator of the Estate of John Ira Nelson Incompetent and the petition in support thereof and the court being fully advised in the premises: It is hereby ordered that the said claim of A. L. Williams be and the same is hereby denied and disallowed, and that the said petition in support thereof is hereby dismissed. It is further ordered that the appeal bond be and it hereby fixed at two hundred fifty (\$250.00) dollars." On April 13, 1945, an appeal bond of John D. Vosnos and Augustus L. Williams in the amount of \$250 was approved and filed in the Probate court. On September 17, 1945, the "conservator" filed

for his own safety; he dangerous to himself; is dangerous to others if permitted to be at large; is in such condition of mind or body as to be a fit subject for care and treatment in a hospital for mentally ill persons; and it was ordered and adjudged that Nelson be committed to the care and custody of the Department of Public Welfare for the State of Illinois, to the Chicago State Hospital, Evanston, Ill. The certified transcript of the record of the Chancery Court of Lee County, Mississippi, shows that after certain preliminary steps had been taken in that court a jury was called to inquire into the condition of mind of John T. Nelson and that after a hearing the jury returned a verdict that Nelson "is of unsound mind and not capable of taking care of himself; and recommend that the said John T. Nelson be committed to State Insane Hospital;" and that thereupon a writ issued commanding the sheriff of Lee County to arrest Nelson and place him in the Lunatic Asylum of the State.

On April 12, 1945, the claim of Williams came on for hearing before the Probate Court of Cook County, at which time the following order was entered: "This cause coming on to be heard upon the claim of A. L. Williams and the removal of the conservator of the estate of John T. Nelson Insipotent and the petition in support thereof and the court being fully advised in the premises: It is hereby ordered that the said claim of A. L. Williams be and the same is hereby denied and dissolved, and that the said petition in support thereof is hereby dismissed. It is further ordered that the appeal bond be and it hereby fixed at two hundred fifty (\$250.00) dollars." On April 13, 1945, an appeal bond of John D. Vornos and Anastas D. Williams in the amount of \$250 was approved and filed in the Probate Court. On September 17, 1945, the "conservator" filed

in the Circuit court of Cook county, before Judge Fisher, a verified motion to dismiss the claim and petition of Williams and Vosnos for the following reasons:

"1. It appears from the record and the Petition of the Claimants herein that on the 8th day of February 1945, the said John Ira Nelson was adjudicated as an incompetent person by the County Court of Cook County and was admitted to the Chicago State Hospital for the insane.

"2. It further appears from the record and from the Claimants' petition in support of said claim that the said John Ira Nelson was incarcerated in the said Chicago State Hospital For The Insane on the 13th day of February, 1945, the date upon which the Claimants claim a contract was made with the said incompetent for the claimants to act as his attorneys.

"3. And it further appears from the record and the claimants' petition in support of said claim, filed herein, that the claimants, nor either of them, were never at any time appointed as the Guardian ad Litem and next friend by the Probate Court or any other Court with authority to represent the said Ward in any proceedings in any Court in this State, and that this Court is without jurisdiction to entertain the Appeal and try this cause De Novo under the particular facts and circumstances disclosed by the record in this cause.

"4. That the Claimants' petition discloses that their alleged agreement with the said incompetent is contrary to Section 276 of the Illinois Revised Statute, 1943, which reads as follows:

"The Conservator of an Estate of an Incompetent shall appear and represent his Ward in all legal proceedings, unless another person is appointed for that purpose as Conservator or next friend, but this does not impair the power of any Court to appoint a Conservator or next friend to defend the interest of the Ward in that Court, or to appoint or allow any person as next

in the Circuit Court of Cook County, before Judge Fisher, a verified motion to dismiss the claim and petition of Williams and Vosnos for the following reasons:

- "1. It appears from the record and the petition of the Claimants herein that on the 8th day of February 1947, the said John Ira Nelson was adjudicated as an incompetent person by the County Court of Cook County and was admitted to the Chicago State Hospital for the insane.
- "2. It further appears from the record and from the Claimants' petition in support of said claim that the said John Ira Nelson was incarcerated in the said Chicago State Hospital for the insane on the 13th day of February, 1947, the date upon which the Claimants claim a contract was made with the said incompetent for the claimants to act as his attorneys.
- "3. And it further appears from the record and the Claimants' petition in support of said claim, filed herein, that the claimants, nor either of them, were never at any time appointed as the Guardian ad litem and next friend by the Probate Court or any other Court with authority to represent the said Ward in any proceedings in any Court in this State, and that this Court is without jurisdiction to entertain the appeal and try this cause De Novo under the particular facts and circumstances disclosed by the record in this cause.
- "4. That the Claimants' petition discloses that their alleged agreement with the said incompetent is contrary to Section 276 of the Illinois Revised Statutes, 1943, which reads as follows:
"The Conservator of an estate of an incompetent shall appear and represent his Ward in all legal proceedings, unless another person is appointed for that purpose as Conservator or next friend, but this does not impair the power of any Court to appoint a Conservator or next friend to defend the interest of the Ward in that Court, or to appoint or allow any person as next

friend of the Ward to commence, prosecute or defend any suit in his behalf.'

"5. That it further appears from the said record and the Claimants' petition in support of the claim filed herein, that during the time and period in which the Claimants alleged that they were performing services for the said incompetent, at the instance and request of the said incompetent, the said incompetent was incarcerated in the said Chicago State Hospital for the Insane, and had not been restored by the order of any Court, and had not been released from said incarceration, and that the said Conservator was lawfully qualified and acting as Conservator of the person and Estate of said Incompetent Ward at the time the alleged agreement with the said incompetent was executed and the alleged services were performed; that said action and conduct of the claimants was contrary to Section 278, Chapter 3 of the Illinois Revised Statute, 1943, which reads as follows:

"'Every note, bill, bond, or other contract by any person who is an adjudged insane person or an adjudged incompetent person is void as against that person or his estate, but a person making a contract with the adjudged insane or adjudged incompetent person is bound thereby. Every contract made with an insane person, an idiot or an imbecile before the adjudication of insanity or incompetency or with any person thereafter adjudged incompetent or had filed for the appointment of a Conservator, may be avoided except in favor of the person fraudulently making the contract.'

"Wherefore, respondent moves that Claimants' claim and Petition in support thereof be dismissed and the Claimants take nothing, and that the said Estate of John Ira Nelson, Incompetent, have judgment for its costs in this behalf sustained, and have execution therefor."

friend of the said and to commence, prosecute or defend any suit in his behalf.

"5. That it further appears from the said record and the claimants' petition in support of the claim filed herein, first during the time and period in which the claimants alleged that they were performing services for the said incompetent, at the instance and request of the said incompetent, the said incompetent was incarcerated in the said Chicago State Hospital for the Insane, and had not been restored by the order of any Court, and had not been released from said incarceration, and that the said Conservator was lawfully qualified and acting as Conservator of the person and estate of said incompetent Ward at the time the alleged agreement with the said incompetent was executed and the alleged services were performed; that said action and conduct of the claimants was contrary to Section 278, Chapter 3 of the Illinois Revised Statute, 1943, which reads as follows:

"Every note, bill, bond, or other contract by any person who is an adjudged insane person or an adjudged incompetent person is void as against that person or his estate, but a person making a contract with the adjudged insane or adjudged incompetent person is bound thereby. Every contract made with an insane person, an idiot or an imbecile before the adjudication of insanity or incompetency or with any person thereafter adjudged incompetent or had filed for the appointment of a Conservator, may be avoided except in favor of the person fraudulently making the contract."

"Wherefore, respondent moves that claimants' claim and petition in support thereof be dismissed and the claimants take nothing, and that the said estate of John Ira Nelson, incompetent, have judgment for its costs in this behalf sustained, and have execution therefor."

On October 17, 1945, Judge Fisher denied the motion of "the conservator," and entered the following order:

"This cause coming on to be heard on the appeal of John D. Vosnos and Augustus L. Williams, from the Probate Court of Cook County, dismissing and disallowing their claim for attorneys' fees etc., as more fully alleged and described in their petition filed in the Probate Court, which petition is before this court on this appeal, and the answer of the conservator, Sarita Nelson, to said petition; and the court having jurisdiction of the parties hereto and the subject matter hereof, and having tried said cause de novo, as provided by statute, and having heard the evidence adduced by the prospective parties, and having heard the arguments of the respective counsel, and being fully advised in the premises, Doth Find:

"1. That the said John D. Vosnos and Augustus L. Williams, appellant-claimants, have a valid claim against the estate of John I. Nelson, Incompetent.

"2. That the said John D. Vosnos and Augustus L. Williams have rendered valuable services to the said John I. Nelson, Incompetent; that said services were necessary and proper for the protection of the liberty, property rights, and the person of the said John I. Nelson, Incompetent; that the said John D. Vosnos and Augustus L. Williams, attorneys, have expended considerable time, skill and effort in obtaining the release, discharge and judicial restoration of the said John I. Nelson, Incompetent, by means of a petition for a writ of habeas corpus; that in the performance of said professional services and duties, it became necessary for them to employ expert psychiatrists and court reporters, and to advance the court costs and other expenditures, and as a consequence thereof, they were compelled to advance, and did advance, on behalf of the said John I. Nelson, Incompetent, the sum of two hundred and fifty

On October 17, 1945, Judge Elshen denied the motion of "the conservator," and entered the following order:

"This cause coming on to be heard on the appeal of John D. Vosnos and Augustus L. Williams, from the Probate Court of Cook County, dissolving and disallowing their claim for attorneys' fees etc., as more fully alleged and described in their petition filed in the Probate Court, which petition is before this court on this appeal, and the answer of the conservator, Garita Nelson, to said petition; and the court having jurisdiction of the parties hereto and the subject matter hereof, and having tried said cause de novo, as provided by statute, and having heard the evidence adduced by the prospective parties, and having heard the arguments of the respective counsel, and being fully advised in the premises, both kinds:

"1. That the said John D. Vosnos and Augustus L. Williams, appellant-claimants, have a valid claim against the estate of John I. Nelson, incompetent.

"2. That the said John D. Vosnos and Augustus L. Williams have rendered valuable services to the said John I. Nelson, incompetent; that said services were necessary and proper for the protection of the liberty, property rights, and the person of the said John I. Nelson, incompetent; that the said John D. Vosnos and Augustus L. Williams, attorneys, have expended considerable time, skill and effort in obtaining the release, discharge, and judicial restoration of the said John I. Nelson, incompetent, by means of a petition for a writ of habeas corpus; that in the performance of said professional services and duties, it became necessary for them to employ expert psychologists and court reporters, and to advance the court costs and other expenditures, and as a consequence thereof, they were compelled to advance, and did advance, on behalf of the said John I. Nelson, incompetent, the sum of two hundred and fifty

dollars (\$250.00) in cash.

"3. That the reasonable, usual and customary value of the services rendered by said John D. Vosnos, and Augustus L. Williams, is the sum of two thousand dollars (\$2,000.00), in addition to the expenditures incurred by said attorneys herein.

"4. That the estate of John I. Nelson, Incompetent, real, personal and mixed, is of the approximate value of \$70,000.00.

"It Is Therefore Ordered, Adjudged and Decreed:

"(a) That the said John D. Vosnos and Augustus L. Williams shall recover from the estate of John I. Nelson, Incompetent, the sum of Two thousand, two hundred and fifty dollars (\$2,250.00).

"(b) That the conservator, Sarita Nelson, her successor or successors in office, be, and he, she or they, are hereby directed to pay to John D. Vosnos and Augustus L. Williams, out of the estate of John I. Nelson, Incompetent, the sum of Two thousand, two hundred and fifty dollars (\$2,250.00), and in addition thereto, the court costs incurred in these proceedings in due administration of the estate aforesaid."

In a motion for a new trial filed by the conservatrix she alleged, inter alia, "that the court erred in entering the judgment herein without swearing witnesses and hearing testimony in support of the claim for attorney's fees filed herein by the claimant * * *." The conservatrix failed to file a report of the proceedings before Judge Fisher, although the record tends to show that a transcript was presented to the judge and approved by him. She is therefore in no position to criticise the conduct of the trial court during the hearing of the claim. However, we are able to determine the merits of this appeal from the record before us.

dollars (\$250.00) in cash.

3. That the reasonable, usual and customary value of the services rendered by said John D. Vornos, and Augustus L. Williams, is the sum of two thousand dollars (\$2,000.00), in addition to the expenditures incurred by said attorneys

herein.

4. That the estate of John I. Nelson, incompetent, real, personal and mixed, is of the approximate value of \$70,000.00.

"It is therefore Ordered, Adjudged and Decreed:

(a) That the said John D. Vornos and Augustus L. Williams shall recover from the estate of John I. Nelson, incompetent, the sum of Two thousand, two hundred and fifty dollars (\$2,250.00).

(b) That the conservator, Garita Nelson, her

successor or assignors in office, he, and he, she or they, are hereby directed to pay to John D. Vornos and Augustus L. Williams, out of the estate of John I. Nelson, incompetent, the sum of Two thousand, two hundred and fifty dollars

(\$2,250.00), and in addition thereto, the court costs incurred

in these proceedings in the administration of the estate aforesaid."

In a motion for a new trial filed by the conservatrix

she alleged, *inter alia*, "that the court erred in entering the

judgment herein without hearing witnesses and hearing testimony

in support of the claim for attorney's fees filed herein by the

claimant * * *". The conservatrix failed to file a report of the

proceedings before Judge Fisher, although the record tends to show

that a transcript was presented to the judge and approved by him.

She is therefore in no position to criticize the conduct of the

trial court during the hearing of the claim. However, we are

able to determine the merits of this appeal from the record

before us.

Section 124, ch. 3, par. 276, Ill. Rev. Stat.

1945, reads as follows:

"276. Sec. 124. Appearance in Suit of Incompetent.)

The conservator of the estate of an incompetent shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose as conservator or next friend. But this does not impair the power of any court to appoint a conservator or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute, or defend any suit in his behalf."

Attorney Williams, the real claimant in this case, as appears from the claim filed in the Probate court, did not see fit to exercise his right to petition that court to appoint a next friend for the incompetent to institute habeas corpus proceedings to determine the mental condition of Nelson. He ignored the conservatrix and the Probate court and started the habeas corpus proceedings without the direction or knowledge of the Probate court or the conservatrix. It is idle for him to argue that he did not commence proceedings in the Probate court because the conservatrix would have opposed any steps that might bring about the discharge of the incompetent, in view of the provisions of Section 124.

In In re Estate of Rankin, Incompetent, 322 Ill. App. 64, the court states (pp. 66, 67):

"The principal and controlling contention of appellee is that when a conservator has been appointed by the court having jurisdiction of the parties and subject matter, an action cannot be lawfully brought, prosecuted, defended or appealed by another person, acting for and on behalf of the ward, by designating himself as next friend, without express appointment and authority from the court. * * * Section 124 of the Probate Act expressly

Section 124, ch. 3, par. 276, Ill. Rev. Stat.

reads as follows:

"276. Sec. 124. Appearance in suit of incompetent.

The conservator of the estate of an incompetent shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose as conservator or next friend. But this does not impair the power of any court to appoint a conservator or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute, or defend any suit in his behalf."

Attorney Williams, the real claimant in this case, as appears from the claim filed in the Probate court, did not see fit to exercise his right to petition that court to appoint a next friend for the incompetent to institute habeas corpus proceedings to determine the mental condition of Nelson. He ignored the conservatrix and the Probate court and started the habeas corpus proceedings without the direction or knowledge of the Probate court or the conservatrix. It is idle for him to argue that he did not commence proceedings in the Probate court because the conservatrix would have opposed any steps that might bring about the discharge of the incompetent, in view of the provisions of Section 124.

In In re Estate of Rankin, Incompetent, 322 Ill.

pp. 64, the court states (pp. 66, 67):

"The principal and controlling contention of appellee is that when a conservator has been appointed by the court having jurisdiction of the parties and subject matter, an action cannot be lawfully brought, prosecuted, defended or appealed by another person, acting for and on behalf of the ward, by designating himself as next friend, without express appointment and authority from the court. * * * Section 124 of the Probate Act expressly

provides that the conservator shall appear and represent his ward in all legal proceedings, unless another person is appointed for that purpose as conservator or next friend. But this does not impair the power of any court to appoint a conservator or next friend to defend the interests of the ward in that court, or to appoint or allow any person as the next friend of a ward to commence, prosecute or defend any suit in his behalf. It is contended by appellee that the above salutary provision requiring such order of court is applicable and is designed and intended to protect the interests and estate of the incompetent ward. Here, it appears from the record that no order was entered by the county court appointing the said McLaren as guardian ad litem or next friend nor was any order of any kind authorizing him to appear in the county court in opposition to the conservator's petition entered by said court. It is patent from the record that said McLaren appeared voluntarily in the proceeding and wholly without authority of any order of the court, ostensibly in behalf of the ward. It is said in Covington v. Neftzger, 140 Ill. 608-612 that one undertaking to appear on behalf of an insane person must have power to act for such person and bind him and his estate and that without proper authority, the lunatic or insane person cannot appear by his next friend."

The petition filed in the Probate court by claimants in support of the claim of Williams was verified and they are bound by the allegations therein made. From the time a person is adjudged to be incompetent and not capable of caring for his property and effects until, if ever, he is restored, he has no more legal power to act for himself than if he were dead, and a contract made with him has no legal significance. Section 126, ch. 3, par. 278, Ill. Rev. Stat. 1945, so provides, and the Supreme and Appellate courts of this State have consistently adhered to the wholesome and necessary provisions in that section. The alleged

provides that the conservator shall appear and represent his

ward in all legal proceedings, unless another person is

appointed for that purpose as conservator or next friend.

But this does not impair the power of any court to appoint a

conservator or next friend to defend the interests of the ward

in that court, or to appoint or allow any person as the next

friend of a ward to commence, prosecute or defend any suit in

his behalf. It is contended by appellee that the above statutory

provision regarding such order of court is applicable and is

designed and intended to protect the interests and estate of the

incapacitated ward. Here, it appears from the record that no order

was entered by the county court appointing the said McEwen as

guardian ~~ad litem~~ or next friend nor was any order of any kind

authorizing him to appear in the county court in opposition to

the conservator's petition entered by said court. It is patent

from the record that said McEwen appeared voluntarily in the

proceeding and wholly without authority of any order of the court.

ostensibly in behalf of the ward. It is said in Goulet v.

Wetter, 140 Ill. 603-612 that one undertaking to appear on

behalf of an insane person may have power to act for such person

and bind him and his estate and that without proper authority, the

insane or insane person cannot appear by his next friend."

The petition filed in the Probate court by claimants in

support of the claim of Williams was verified and they are bound

by the allegations therein made. From the time a person is ad-

judged to be incapacitated and not capable of caring for his property

and effects until, if ever, he is restored, he has no more legal

power to act for himself than if he were dead, and a contract

made with him has no legal significance. Section 106, ch. 3,

par. 278, Ill. Rev. Stat. 1945, so provides, and the Supreme and

Appellate courts of this State have consistently adhered to the

wholesome and necessary provisions in that section. The alleged

contract set up in claimants' petition was not only void but it was so unconscionable that it tends strongly to show that Nelson was, in fact, mentally incompetent when he made it. It appears from the statements made in the petition that Williams expected to receive payment for his services from the incompetent when the latter should be declared competent, and that at the time the contract was made he had no intention to apply to the Probate court for payment of his fee out of the estate of Nelson, Incompetent. Two days after the discharge of the incompetent by Judge Dunne he was adjudged insane in the Chancery Court of Lee County, Mississippi, and was committed to the Mississippi Insane Asylum. It is reasonably clear that when the claimants were confronted with that situation they concluded to attempt to collect their claim against his estate in the Probate court. The judge of the Circuit court who tried this cause recognized that the alleged contract with the incompetent was void and he entered judgment in favor of the claimants upon the theory that they had rendered necessary and proper services for the protection of the liberty, property rights, and the person of the said John I. Nelson, Incompetent, and that they were entitled to reasonable compensation for said services, and the court found that the reasonable, usual and customary value of services rendered by them was \$2,000, and he also allowed them \$250 for moneys they advanced to employ expert psychiatrists and court reporters. In awarding the fee the trial court seems to have been influenced by the fact that the estate of the incompetent had an approximate valuation of \$70,000. Claimants contend that there are authorities that sustain the position taken by the trial court. In 32 C. J. Insane Persons Sec. 445, p. 711, the author states: "The estate is liable for reasonable counsel fees rendered for the protection of the ward's person or property, such services being considered necessities. Reasonable counsel

contract set up in claimants' petition was not only void but it was so unconscionable that it tends strongly to show that Nelson was, in fact, mentally incompetent when he made it. It appears from the statements made in the petition that Williams expected to receive payment for his services from the incompetent when the latter should be declared competent, and that at the time the contract was made he had no intention to apply to the Probate court for payment of his fee out of the estate of Nelson, Inc. Two days after the discharge of the incompetent by Judge Dunn he was adjudged insane in the Orleans County of Lee County, Mississippi, and was committed to the Mississippi Insane Asylum. It is reasonably clear that when the claimants were confronted with that situation they concluded to attempt to collect their claim against his estate in the Probate court. The Judge of the circuit court who tried this cause recognized that the alleged contract with the incompetent was void and he entered judgment in favor of the claimants upon the theory that they had rendered necessary and proper services for the protection of the liberty, property rights, and the person of the said John I. Nelson, Inc., and that they were entitled to reasonable compensation for said services, and the court found that the reasonable, usual and customary value of services rendered by them was \$2,000, and he also allowed them \$50 for money they advanced to employ expert psychiatrists and court reporters. In awarding the fee the trial court seems to have been influenced by the fact that the estate of the incompetent had an approximate valuation of \$70,000. Claimants contend that there are authorities that sustain the position taken by the trial court. In 32 C. L. Insane Persons Sec. 447, p. 711, the author states: "The estate is liable for reasonable counsel fees rendered for the protection of the ward's person or property, such services being considered necessities. Reasonable counsel

fees for services rendered the committee or guardian in defending and protecting the estate of his ward may properly be allowed against the estate; and counsel fees may also be allowed for services rendered directly to the lunatic in good faith and on reasonable grounds, as in opposing or attempting to supersede the inquisition of lunacy, or in prosecuting habeas corpus proceedings to investigate the grounds of the detention of one restrained as a lunatic. Such services should be rigidly supervised by the committee and the court, and should be restricted to necessary services and reasonable fees. The necessity of the services rendered as for the benefit of the estate must appear affirmatively. But the right to such compensation is not necessarily dependent on the success of the litigation, where the services have been faithfully and intelligently performed." The author cites a number of authorities in support of this text. In 44 C. J. S. Insane Persons Sec. 88, p. 236, the author states that "the estate is liable for reasonable counsel fees rendered for the protection of the ward's person or property, although such employment was not first approved by the court, as the approval of the court may be had at the time allowance therefor is asked." Several cases are cited in support of this text. Whether the aforesaid principles of law are applicable to the instant proceeding, in view of the provisions of Section 124, may well be questioned. But if we assume that the trial court had the legal right to award compensation to claimants, nevertheless, it then became his duty to keep in mind that Nelson was a ward of the court and that the law demands that his estate be jealously guarded, and that any claims against it be "rigidly supervised by the court."

The record shows without contradiction that the unfortunate incompetent was at liberty for only two days after claimants had secured his discharge before Judge Dunne, and in our

ants had secured his discharge before Judge Dunn, and in our estate incompetent was at liberty for only two days after claim- The record shows without contradiction that the unfor- supervised by the court."

jealously guarded, and that any claims against it be "strictly ward of the court and that the law demands that his estate be less, it then became his duty to keep in mind that Nelson was a had the legal right to award compensation to claimants, nevertheless may well be questioned. But if we assume that the trial court instant proceeding, in view of the provisions of Section 124, whether the aforesaid principles of law are applicable to the is asked." Several cases are cited in support of this text.

approval of the court may be had at the time allowance therefor such employment was not first approved by the court, as the for the protection of the ward's person or property, although that "the estate is liable for reasonable counsel fees rendered In 44 U. S. Insane Persons Sec. 38, p. 236, the author states author cites a number of authorities in support of this text.

services have been faithfully and intelligently performed." The early dependent on the success of the litigation, where the affirmatively. But the right to such compensation is not neces- services rendered as for the benefit of the estate must appear to necessary services and reasonable fees. The necessity of the vised by the committee and the court, and should be restricted restrained as a lunatic. Such services should be rigidly super- ceedings to investigate the grounds of the detention of one the institution of lunacy, or in prosecuting habeas corpus pro- on reasonable grounds, as in opposing or attempting to supersede for services rendered directly to the lunatic in good faith and allowed against the estate; and counsel fees may also be allowed ing and protecting the estate of his ward may properly be fees for services rendered the committee or guardian in defend-

opinion the trial court did not give enough weight to this fact when he found that the services rendered were necessary for the "protection of the liberty, property rights, and the person of the said John I. Nelson, Incompetent," and that he gave too much weight to the fact that the estate of the incompetent had an approximate value of \$70,000. The fact that Williams was a volunteer and stood before the court - a court that applies equitable principles when it passes upon claims against estates - seeking to have enforced an unconscionable agreement that he claims he made with the incompetent, was, apparently, disregarded.

Viewed from any standpoint, \$1,000 would be a generous allowance to claimants for any services they rendered the incompetent. If claimants, within ten days, will enter a remittitur in the sum of \$1,000 the judgment of the Circuit court of Cook county will be sustained; otherwise the judgment will be reversed and the cause remanded for a new trial.

JUDGMENT AFFIRMED UPON
REMITTITUR; OTHERWISE
REVERSED AND REMANDED
FOR NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

opinion the trial court did not give enough weight to this fact when he found that the services rendered were necessary for the "protection of the liberty, property rights, and the person of the said John I. Nelson, incompetent," and that he gave too much weight to the fact that the estate of the incompetent had an approximate value of \$70,000. The fact that Williams was a volunteer and stood before the court - a court that applies equitable principles when it passes upon claims against estates - seeking to have enforced an unconscionable agreement that no claims he made with the incompetent, was, apparently, disregarded. Viewed from any standpoint, \$1,000 would be a generous allowance to claimants for any services they rendered the incompetent. If claimants, within ten days, will enter a remittitur in the sum of \$1,000 the judgment of the Circuit court of Cook county will be sustained; otherwise the judgment will be reversed and the case remanded for a new trial.

JUDGMENT AFFIRMED FROM
RE TRIAL; OTHERWISE
REVERSED AND REMANDED
FOR NEW TRIAL.

Delivered, at St. Louis, Mo., this 11th day of June, 1908.

43441

CRANE PACKING COMPANY,

Appellant,

v.

OLIN BRUMMER,

Appellee.

395
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

329 I.A. 272

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to compel the assignment of an inventor's interest in an application for a patent and for other relief. The decree dismissed the complaint for want of equity and reserved jurisdiction for the purpose of determining defendant's damages arising out of the issuance of the injunction. Plaintiff has appealed.

Brunner is an inventor of flexible fluid seals which are used in automobile engines. He was employed in September of 1940 by plaintiff to work in its experimental laboratory in aid of its production of fluid seals. July 29, 1941 and December 28, 1943, plaintiff was granted U. S. Patent Nos. 2251219 and 2337639 under applications filed by Brunner. These applications had been assigned by him pursuant to his employment agreement with plaintiff. These applications and patents covered the original and improved Crane Bellows Seals. We shall refer to these seals as Exhibits 4 and 5. A controversy arose between the parties over the patents and related matters. In 1942 Brunner sued and plaintiff counterclaimed. This litigation was compromised by an agreement made June 7, 1944. It is the alleged violation by Brunner of the agreement which is the basis of this action.

JOHN F. BROWN COMPANY

Plaintiff

v.

JOHN F. BROWN COMPANY

Defendant

JOHN F. BROWN COMPANY

Plaintiff

JOHN F. BROWN COMPANY

3221A.212

JOHN F. BROWN COMPANY

This is an action to compel the assignment of an

inventor's interest in an application for a patent and for other

relief. The decree dissolved the contract for want of equity

and reserved jurisdiction for the purpose of determining defendant's

damages arising out of the issuance of the injunction. Plaintiff

has appealed.

Plaintiff is an inventor of fluid seals which

are used in automobile engines. He was employed in September

of 1940 by defendant to work in its experimental laboratory in

aid of the production of fluid seals. July 22, 1941 and September

26, 1941, defendant was granted U. S. Patent Nos. 2,307,719 and

2,307,720 under applications filed by plaintiff. These applications

had been assigned by him pursuant to his employment agreement

with plaintiff. These applications and patents covered the original

and improved fluid seals. He shall refer to these seals

as exhibits A and B. A controversy arose between the parties

over the patents and related matters. In 1942 plaintiff sued and

plaintiff counterclaimed. This litigation was concluded by an

agreement made June 7, 1944. It is the alleged violation by

plaintiff of the agreement which is the basis of this action.

Under the agreement Brummer was paid \$15,000. He agreed to assign to plaintiff his right, title and interest in inventions and improvements theretofore conceived, made or acquired relating to any device covered by the following description: "A flexible seal * * * made in part or in whole of rubber * * * and adapted to seal, against fluid leakage, members between which there is relative movement (* * * for example, to prevent leakage from the fluid chamber of pumps of internal combustion engines between the driving shaft and the bearing) the rubber * * * being cast, molded, formed or constructed with one or more bellows or accordion-like fold or folds or in any form similar thereto." He further agreed to assign applications and patents covering devices within the description whether theretofore or thereafter filed or issued, and particularly confirmatory assignments of Nos. 2251219 and 2337639.

Brummer made the confirmatory assignments on June 22, 1944. July 18th he wrote plaintiff, sending a sample seal which we shall call Exhibit 6. He advised plaintiff that he had applied for a patent on the seal June 24th and intended to manufacture and market it. This application was signed by Brummer June 19th. He requested from plaintiff a letter to the effect that it had no interest in the seal, to avoid future controversy. Plaintiff notified him July 26th that Exhibit 6 came within the terms of the agreement. It demanded an assignment of the patent application and notified Brummer not to make or market the seal. Defendant refused the demand.

The question is whether Exhibit 6, for which Brummer filed a patent application, is "cast, molded, formed or constructed with one or more bellows or accordion-like fold or folds or in any form similar thereto."

Under the present contract was paid \$15,000. We agreed to assign to plaintiff his right, title and interest in inventions and improvements theretofore conceived, made or acquired relating to any device covered by the following description: "A flexible seal * * * made in part or in whole of rubber * * * and adapted to seal, against fluid leakage, members between which there is relative movement (* * * for example, to prevent leakage from the fluid chamber of pumps or internal combustion engines between the driving shaft and the bearing) the rubber * * * being cast, molded, formed or constructed with one or more bellows or accordion-like folds or folds or in any form similar thereto." We further agreed to assign positions and patents covering devices within the description whether theretofore or thereafter filed or issued, and particularly compulsory assignments of Nos. 2,231,712 and 2,231,713. Brunner made the compulsory assignments on June 22, 1944. July 18th he wrote plaintiff, sending a sample seal which we shall call Exhibit G. We advised plaintiff that he had applied for a patent on the seal June 24th and intended to manufacture and market it. This application was signed by Brunner June 18th. He requested from plaintiff a letter to the effect that it had no interest in the seal, to avoid future controversy. Plaintiff notified him July 7th that Exhibit G came within the terms of the agreement. It was made an assignment of the patent application and notified Brunner not to make or market the seal. Defendant refused the demand.

The question is whether Exhibit G, for which Brunner filed a patent application, is "cast, molded, formed or constructed with one or more bellows or accordion-like folds or in any form similar thereto."

Exhibits 4, 5 and 6 are flexible fluid seals. They are designed to fit around the shaft of an automobile engine, which rotates the impeller in the water chamber, so as to circulate the air-cooled water through the engine. Ordinarily this shaft carries the cooling fan. The function of these seals is to isolate the shaft and its bearing from the water. The seals are made of rubber or like material. They are compressible and in normal operation are 20 percent compressed. Any one of these seals in practice at one end forces a hard surface washer against the shaft and bearing casing and at the other end fitting so close against the impeller that no water can leak from the water chamber on to the shaft and into the bearing. The compressibility permits expansion and contraction along the shaft to cover wear and play which the fan tends to cause. The compressibility is possible through folds, in the material of which the seals are made, and metal springs.

Each seal consists of a tubular axis and two ends or faces. The measurement from end to end is $9/16$ of an inch, the diameters of the faces about $1-3/16$ inches, the bore of the sleeve about $5/8$ of an inch. The metal spring fits between the faces and along the exterior of the axis. On the inside of the faces are flanges upon which fit the end rounds of the spring. The circumferences of the rounds of the spring are less than the circumferences of the faces. The compressibility of the seal is along the axis in the Crane Bellows seal. Whether it is likewise in the Brummer seal is disputed. A photograph in evidence shows exhibits 5 and 6 compressed to $13/32$ of an inch.

We have all the exhibits before us. There are various flexible seals in the record in addition to Exhibits 4, 5 and 6. There are photographs and detailed sketches. There is a section of an automobile water pump which enables us to observe the function of the seals. There are helpful devices which enable

Exhibits 4, 5 and 6 are flexible fluid seals. They are designed to fit around the shaft of an automobile engine, which rotates the impeller in the water chamber, so as to circulate the air-cooled water through the engine. Ordinarily this shaft carries the cooling fan. The function of these seals is to isolate the shaft and the bearing from the water. The seals are made of rubber or like material. They are compressible and in normal operation are in constant compression. Any one of these seals in practice at one end forces a hard surface washer against the shaft and bearing casing and at the other and fitting so close against the impeller that no water can leak from the water chamber on to the shaft and into the bearing. The compressibility permits expansion and contraction along the shaft to cover wear and play which the fan tends to cause. The compressibility is possible through folds in the material of which the seals are made, and metal springs.

Each seal consists of a tubular sleeve and two ends or faces. The measurement from end to end is $3/16$ of an inch, the diameter of the faces about $1-5/16$ inches, the bore of the sleeve about $5/8$ of an inch. The metal spring fits between the faces and along the exterior of the sleeve. In the inside of the faces are flanges upon which fit the end rounds of the spring. The clearances of the rounds of the spring are less than the clearances of the faces. The compressibility of the seal is along the axis in the same hollow seal. Whether it is likewise in the former seal is doubted. A photograph in evidence shows Exhibits 5 and 6 compressed to $15/32$ of an inch.

We have all the exhibits before us. There are various flexible seals in the room in addition to Exhibits 4, 5 and 6. There are photographs and detailed sketches. There is a section of an automobile water pump which enables us to observe the function of the seal. There are helpful devices which enable

us to see the action of the seals under various degrees of compression. There are sections of seals arranged to give us a thorough understanding. This complete record of exhibits places us in a better position than we normally occupy. We have less dependence upon the decision of the trial court. The credence to be given the oral testimony is that court's province. We are in as good position as it was with respect to the exhibits.

Sellers v. Kincaid, 303 Ill. 216.

Complaint is made of undue restriction in plaintiff's cross-examination of defendant's expert. The court refused to permit plaintiff's counsel to use certain pencil sketches of types of seals. It also refused to permit examination of the expert as to the action of a bellows in drawing and expelling air. This had a bearing generally on the meaning of the term "bellows." Ordinarily these matters would have been proper for examination of the expert. In view of the many sketches and exhibits, used both in direct and cross-examination of the witness, we believe the court had sufficient before it to test the expert's qualifications. We see no abuse of discretion in the court's ruling.

Plaintiff complains also of the admission in evidence of certain documents involved in negotiating the settlement contract of June 7th. Some of these documents were offered by defendant and admitted over plaintiff's objection; others were introduced by plaintiff in rebuttal. Plaintiff by introducing the balance of the documents did not waive its right to make this point. Kane v. City of Chicago, 392 Ill. 172; 64 N. E. (2) 506.

The question is whether the documents introduced were inadmissible as varying the terms of the contract. Plaintiff's attorney Chadwell sent defendant's attorney Guthrie a draft of a paragraph of the proposed agreement, under which the Brummer

us to see the action of the same under various degrees of compression. There are sections of same prepared to give us a thorough understanding. This complete record of exhibits placed us in a better position than we normally occupy. We have less dependence upon the decision of the trial court. The evidence to be given the oral testimony is that court's decision. It is in a good position as it was with respect to the exhibits.

Winters v. Winters, 202 Ill. 111.

Complaint is made of undue restriction in Plaintiff's

cross-examination of defendant's expert. The court refused to permit Plaintiff's counsel to use certain pencil sketches of types of seals. It also refused to permit examination of the expert as to the action of a bellows in drawing and swelling air. This had a bearing especially on the meaning of the term "bellows." Ordinarily these matters would have been proper for examination of the expert. In view of the many sketches and exhibits, used both in direct and cross-examination of the witness, we believe the court had sufficient before it to test the expert's qualifications. We see no abuse of discretion in the court's ruling.

Plaintiff complains also of the admission in evidence

of certain documents involved in a recasting the settlement contract of June 7th. Some of these documents were offered by defendant and admitted over Plaintiff's objection; others were introduced by Plaintiff in rebuttal. Plaintiff by introducing the balance of the documents did not waive the right to make this point. Lang v. City of Chicago, 272 Ill. 177; 84 N. E. 213.

The question is whether the documents introduced were inadmissible as varying the terms of the contract. Plaintiff's attorney had called defendant's attorney outside a draft of a paragraph of the proposed agreement, under which the transfer

assignment would include all flexible seals of rubber or a substitute material conceived prior to the date of the agreement, together with all patents and applications. Guthrie responded with a substitute paragraph, "which I believe describes the invention we are talking about and is in no sense unduly or unfairly restricted." This paragraph was similar to the one finally adopted. It appears from Guthrie's later and final letter of June 7th that he and Chadwell had discussed Guthrie's previous proposal and modified it in certain respects. In this letter, moreover, Guthrie stated that he considered the purpose of both parties was to include all "bellows seals", including those for which patent applications had been filed and assigned and other bellow seals which because of difference in type or function of the ends, or for other reasons, might be claimed to lie outside the claims of the patents. He explained that Brummer had in mind other seals which had no bellows or accordion-like folds which might be developed in the future and about which he would not disclose his ideas. This letter was signed by both Guthrie and Brummer. In response Chadwell wrote that the "modified draft was satisfactory to our client."

We think these documents were admissible. The nub of the main controversy is the meaning of the words of the description. Unless we know what these words mean, we cannot say whether exhibit 6 is included in them. The meaning to be given is that which the parties intended when the words were written and adopted. These documents have a bearing. They do not vary or contradict the terms of the contract. They help in understanding its terms. Statements made in defendant's negotiation letters are not self-serving. They are expressions of intention. They were "seen"

alignment would include all flexible seals of rubber or a substitute material conceived prior to the date of the agreement, together with all patents and modifications. Guthrie responded with a substitute paragraph, which I believe describes the invention we are talking about and is in no sense unduly or unfairly restricted." This paragraph was similar to the one finally adopted. It appears from Guthrie's later and final letter of June 7th that he and Chaswell had discussed Guthrie's previous proposal and modified it in certain respects. In this letter, moreover, Guthrie stated that he considered the purpose of both parties was to include all "belows seals", including those for which patent applications had been filed and assigned and other below seals which become of difference in type or function of the ends, or for other reasons, might be claimed to lie outside the claims of the patents. He explained that Truesher had in mind other seals which had no bellows or accordion-like folds which might be developed in the future and about which he would not disclose his ideas. This letter was signed by both Guthrie and Truesher. In response Chaswell wrote that the modified draft was satisfactory to our client.

I think these documents were authentic. The nub of the main controversy is the meaning of the words of the description. Unless we know what the words mean, we cannot say whether exhibits 1 is included in them. The meaning to be given is that which the parties intended when the words were written and adopted. These documents have a history. They do not vary or contradict the form of the contract. They help in understanding its terms. Statements made in defendant's modification letters are not self-serving. They are expressions of intention. They were "seen"

by plaintiff through Chadwell before they were accepted.

Prior to the day of trial plaintiff moved, under Supreme Court Rule No. 17 (8), for an order directing defendant to produce Brummer's application for patent on Exhibit 6. Defendant was ordered to produce a certified copy of the document. At the trial he submitted it to the court to determine its materiality and claimed its admissibility in behalf of defendant. Later defendant offered the document. It was received over plaintiff's objection that it contained statements which, in view of defendant's presence as a witness, were self-serving. Plaintiff's contention is correct. The document should not have been admitted. That it was produced under the Rule did not add to its admissibility. There was, however, ample competent evidence in the record upon which the court could make its decision on the issue. We shall, accordingly, presume that the trial court disregarded the document.

Waggoner v. Clark, 293 Ill. 256.

The words, "cast, molded, formed or constructed" used in the general description, have meanings that are plain as used here. Webster's New International Dictionary, Second Edition, defines the verb "cast" as, "to form into a particular shape." The word, "construct" as, "to build, form or make." The word, "form" as, "to give form or shape to." The word, "mold" as, "to form into a particular shape, and to shape in or as in a mold." The question is whether the rubber of which Exhibit 6 is made is cast, molded, formed or constructed with one or more bellows or accordion-like fold or folds or in any manner similar thereto.

The parties apparently agree that "bellows" and "accordion-like" do not mean different kinds of folds. They are synonyms. Each, however, limits the meaning of the other. Plaintiff's Expert Lindsay testified that the dimensions and purpose of Exhibits 4 and 5, admittedly formed of bellows or accordion-like

by plaintiff through Chadwell before they were accepted.
 Prior to the day of trial plaintiff moved, under number
 Court Rule No. 17 (2), for an order directing defendant to produce
 evidence in support of his claim on Exhibit B. Defendant was
 ordered to produce a verified copy of the document. At the
 trial he submitted it to the court to determine its authenticity
 and claimed its authenticity in behalf of defendant. Later
 defendant offered the document. It was received over plaintiff's
 objection that it contained a recalculation which, in view of defendant's
 presence as a witness, was self-serving. Plaintiff's con-
 cession is correct. The document should not have been admitted.
 That it was produced under the rule did not add to its authenticity.
 There was, however, ample competent evidence in the record upon
 which the court could make its decision on the issue. We shall,
 accordingly, presume that the trial court disregarded the document.
Wagner v. Clark, 233 Ill. 206.

The words, "cast, folded, formed or constructed" used
 in the general description, have meanings that are plain as used
 here. Webster's New International Dictionary, Second Edition,
 defines the verb "cast" as, "to form into a particular shape."
 The word, "construct" as, "to build, form or make." The word,
 "form" as, "to give form or shape to." The word, "fold" as, "to
 form into a particular shape, and to shape in so as in a fold."
 The question is whether the rubber of which Exhibit B is made is
 cast, folded, formed or constructed with one or more bellows or
 accordion-like folds or ribs or in any manner similar thereto.
 The parties apparently agree that "bellows" and
 "accordion-like" do not mean different kinds of folds. They are
 synonyms. Each, however, limits the meaning of the other. Plain-
 ly's expert testimony testified that the dimensions and shape
 of Exhibits A and B, admittedly formed of bellows or accordion-like

folds, and Exhibit 6 were the same; that the metal springs used in each are practically identical and are fitted the same way; that the end round of each end of the springs fits into corresponding shoulders inside the faces of each seal; that Exhibits 5 and 6 each have folds which bend toward and away from each other in the same manner; and that the folds in each seal permit the seal to expand and contract without relying upon the elasticity of the material. He said that Exhibit 6 contained bellows folds. One of these he said was formed on each side by a horizontal part, or "shoulder", extending inward from the face and the vertical part which joins the "shoulder" with the tubular axis. The other fold he said was formed on each side by the axis and the vertical part. He gave his opinion that Exhibit 6 contained a bellows or accordion-like fold. He defined "bellows" as a general term meaning, extensible and compressible.

Expert Witness Schmitz, plaintiff's chief engineer, corroborated the testimony as to the folds in Exhibit 6. He gave his opinion that Exhibit 6 was a "bellows seal." He said, however, that the core of the mold used for making Exhibit 5 would have to be changed to make Exhibit 6, since the former requires multiple cavities and the latter a single cavity.

Bruemer testified that he takes credit for developing the bellows seal; that Exhibits 4 and 5 are bellows seals; that the name "bellows seal" derives from the "bellows or accordion-like sleeve" connected to circular end pieces; that Exhibit 6 consists of two circular end pieces with shoulders connected by a straight molded sleeve; that Exhibit 5 could not be made on the same ~~was~~ type mold as Exhibit 6; and that the saw-tooth effect of the mold used to make Exhibit 5 is to make a molded "bellows or accordion-like fold."

fold, and Exhibit 5 were the same; that the metal springs used in each are practically identical and are fitted the same way; that the end rings of each and of the springs fits into corresponding shoulders inside the faces of each seal; that Exhibits 5 and 6 each have folds which bend toward and away from each other in the same manner; and that the folds in each seal permit the seal to expand and contract without relying upon the elasticity of the material. He said that Exhibit 6 contained bellows folds. One of these the fold was formed on each side by a horizontal part, or "shoulder", extending inward from the face and the vertical part which joins the "shoulder" with the center axis. The other fold he said was formed on each side by the axis and the vertical part. He gave his opinion that Exhibit 6 contained a bellows or accordion-like fold. He defined "bellows" as a series of transverse, expandable and compressible.

Expert witness called, Plaintiff's chief engineer,

corroborated the testimony as to the folds in Exhibit 6. He gave his opinion that Exhibit 6 was a "bellows seal". He said, however, that the core of the mold used for making Exhibit 5 would have to be changed to make Exhibit 6, since the former requires multiple cavities and the latter a single cavity.

Plaintiff testified that he takes credit for developing

the bellows seal; that Exhibits 4 and 5 are bellows seals; that the same "bellows seal" derives from the "bellows or accordion-like sleeve" connected to shaft and witness; that Exhibit 6 consists of two cylinders and sleeve with shoulders connected by a straight molded sleeve; that Exhibit 5 could not be made in the same way type mold as Exhibit 6; and that the new-fangled effect of the seal used to make Exhibit 6 is to make a molded "bellows or accordion-like fold".

Defendant's Expert Matter, once acting chief engineer for plaintiff, and an inventor of seals, stated that Exhibit 5 consists of the end surfaces and a bellows section. He stated that its "sleeve" is of accordion form or a bellows form; that Exhibit 6 is not a bellows or accordion-like fold; that "I cannot see" the similarity to a bellows or accordion-like fold; that "bellows is a construction consisting of a number of washer-like parts aligned parallel with the axis and joined at their inner and outer peripheries to form the construction which can be extended or compressed"; that a seal could be bellows-like when compressed and not when uncompressed; that usually a fold in a sleeve to be bellows "would be" V shaped and could be rounded, since if less than a right angle it would fold; and that there must be at least two folds in a sleeve in order to form a bellows. One of plaintiff's experts was the only witness who attempted a definition of the term "bellows." He said it meant in general extensible and compressible. Webster's New International Dictionary, Second Edition, gives several definitions, among them:

"An instrument * * * which by alternate extension and contraction * * * draws in air * * *; the lungs; the expansible part of a photographic camera * * *."

Accordion is defined as:

"Folding like an accordion; creased or hinged so as to fold like an accordion; * * *."

Part of a deposition of plaintiff's president was read into evidence. He stated there are several kinds of bellows; and that the term came from metal bellows which had an accordion design. There are exhibits of forms of metal bellows in the record. Those in the record are formed by folds, rounded at the points of folds as in Exhibit 5, but with the sides of the folds built much closer together, leaving less space between the points of the folds.

Defendant's expert witness, once acting chief engineer
 for plaintiff, and an inventor of seals, stated that Exhibit B
 consists of the end surface and a bellows section. He stated
 that the "seal" is of section form on a bellows form; that
 Exhibit B is not a bellows or accordion-like fold; that "I cannot
 see" the similarity to a bellows or accordion-like fold; that
 "bellows is a construction consisting of a number of water-tight
 parts joined together with the ends and joined at their inner
 and outer peripheries to form the construction which can be
 extended or compressed"; that "I could be bellows-like when
 compressed and not when uncompressed; that usually a fold in a
 sleeve to be bellows 'would be' V shaped and could be rounded,
 since it has a right angle it would fold; and that there
 must be at least two folds in a sleeve in order to form a bellows.
 One of plaintiff's experts was the only witness who attempted
 a definition of the term "bellows". He said it meant in general
 extensible and contractible, but that was an international dictionary.
 Second edition, gives several definitions, among them:
 "a instrument * * * which by alternate extension
 and contraction * * * draws in air * * * the pump;
 the extensible part of a photo-telegraphic apparatus."
 Accordion is defined as:
 "resembling like an accordion; pressed or hinged so
 as to fold like an accordion; * * *"
 Part of a description of plaintiff's president was read
 into evidence. He stated there are several kinds of bellows; and
 that the term covers (among others) bellows which had an accordion
 design. There are varieties of forms of metal bellows in the
 record. Those in the record are formed by folds, rounded at the
 points of folds as in Exhibit B, but with the sides of the folds
 built much closer together, leaving less space between the
 points of the folds.

We believe that the fullest understanding of the language used in the description requires consideration of the functions of Exhibits 5 and 6. Technical experts testified for plaintiff that Exhibits 5 and 6 were the same in function. Those for defendant testified they were not. We have studied the many exhibits very closely. The sketches reproduced hereunder give a fair lateral view of the seals, uncompressed and as fitted over a section of shaft.

Fig. A

Exhibit 5

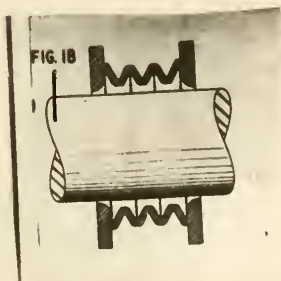
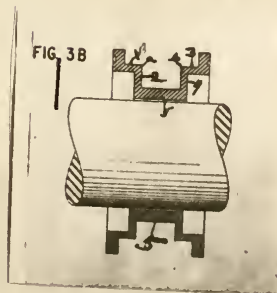


Fig. B

Exhibit 6



I believe that the fullest understanding of the
language used in the description requires consideration of
the functions of Exhibits 5 and 6. Technical experts testified
for plaintiff that Exhibits 5 and 6 were the same in function.
Those for defendant testified they were not. We have studied
the two exhibits very closely. The sketches reproduced here-
under give a fair lateral view of the same, unenlarged and
as fitted over a section of shaft.

Fig. A
Exhibit 5



Fig. B
Exhibit 6



The photographs reproduced hereunder fairly represent from the same view the seals under different degrees of compression.

Fig. C

Exhibit 5

Fig. D

Exhibit 5



Fig. E

Exhibit 6

Fig. F

Exhibit 6



The photographs reproduced hereunder fairly represent
 from the same view the seals under different degrees of
 compression.

Fig. D

Exhibit 6

Fig. B

Exhibit 6

Fig. F

Exhibit 6

Fig. E

Exhibit 6

The sketches, figures A and B, show that in construction the seals are dissimilar. It is the contention of plaintiff that parts 1 and 2, 2 and 5, 4 and 5 and 3 and 4 in Fig. B. form "Bellows or accordion-like folds." We think these parts might be re-arranged to form such folds, but our conclusion is that as constructed they do not fall within the term.

We believe that the metal bellows; the sketches reproduced, together with the testimony we have related and the testimony and our observations of the metal bellows are sufficient bases for our finding that Exhibit 6 is not "cast, molded, constructed or formed with one or more bellows or accordion-like fold or folds."

Is Exhibit 6 formed or constructed in any manner similar thereto? Webster's New International Dictionary, Second Edition, defines the word "similar" as "nearly corresponding; resembling in many respects; some like, having a general likeness." The term does not mean exactly the same. If it did, plaintiff points out, the phrase in which it appears would be unnecessary. Defendant says the metal bellows in the record are similar. The sides of the "folds" in Exhibit 6 are in a different position with respect to each other than the sides of those in the metal bellows. This fact would indicate that they did not resemble a bellows fold. The folds in Exhibit 6 are in a different position with respect to the axis of the seal. This would indicate that they did not resemble accordion-like folds. We believe that in form and construction Exhibit 6 does not contain any fold or folds similar in any manner to a bellows or accordion-like fold.

In function the seals are dissimilar. A study of the photographs of Exhibit 5, Figs. C and D, shows how the folds

The sketches, figures 4 and 5, show that in construction

the metal is dissimilar. It is the contention of Plaintiff

that parts 1 and 2, 3 and 4, 5 and 6, 7 and 8 and 9 and 10 in Fig. 4.

form "allow or recession-like folds." We think these parts

might be re-expressed as form such folds, but our conclusion is

that as constructed they do not fall within the term.

We believe that the metal bellows; the sketches

referred to, together with the testimony we have related and the

testimony and our observation of the metal bellows are sufficient

basis for our finding that Exhibit 5 is not "cast, rolled, con-

structed or formed with one or more bellows or recession-like

folds or folds."

Exhibit 6 formed or constructed in any manner

similar thereto Webster's New International Dictionary, "second

edition, defines the word "similar" as "nearly corresponding;

resembling in many respects; some like, having a general likeness."

The term does not mean exactly the same. It is, Plaintiff

points out, the places in which it occurs would be unnecessary.

Defendant says the metal bellows in the record are similar. The

edges of the "folds" in Exhibit 6 are in a different position

with respect to each other than the edges of those in the metal

bellows. This fact would indicate that they did not resemble a

bellows fold. The folds in Exhibit 6 are in a different position

with respect to the axis of the seal. This would indicate that

they did not resemble recession-like folds. We believe that in

form and construction Exhibit 5 does not contain any fold or

folds similar in any manner to a bellows or recession-like fold.

In function the metal is dissimilar. A study of

the photographs of Exhibit 5, Figs. 4 and 5, shows how the folds

are forced against each other under compression. There is a collapse of the section between the end pieces. In Exhibit 6, figures E and F, that section is seen to remain relatively the same under compression. As the end pieces are forced toward each other the visible length of the main horizontal part, #5 in Fig. B, is diminished. The reason for the difference is not perceptible in these figures. It will appear in the following paragraph.

Exhibit 6 has counterbored end pieces. The diameter of the counterbored hole in each end piece is larger than the outside diameter of the sleeve so as to permit the sleeve to pass into the end pieces in a "telescoping" action when the seal is under pressure. This so-called telescopic action is brought about by the resistance of the heavier part, #5 (Fig. B.), to the pull of parts 2 and 4 as they move with points a and b toward each other. Those points are pulled downward somewhat, giving the rounded appearance shown in Fig. F. This pull on part #5 is reflected in some lifting of each end slightly away from the shaft. Our analysis of this function is not reconcilable with plaintiff's. It says that parts 1 and 2, 2 and 5, 4 and 5, 3 and 4, Figure B have the same relative movements as the folds in Fig. A. The angles which these parts form together are reduced to less than right angles in function. In this respect they may be said to fold or be folds. We cannot say, however, that they are "bellows or accordion-like" folds.

We think these findings are consistent with the intention of the parties as indicated in the negotiations and correspondence. It is clear Brummer did not intend to include Exhibit 6 in the agreement. He expressed a contrary intention.

are forced against each other under compression. There is a collapse of the section between the end pieces. In Exhibit 6, figures 1 and 2, that section is seen to remain relatively the same under compression. As the end pieces are forced toward each other the width length of the main horizontal part, in figure 1, is diminished. The reason for the difference is not perceptible in these figures. It will appear in the following paragraph.

Exhibit 6 has counterbored end pieces. The diameter of the counterbored hole in each end piece is larger than the outside diameter of the sleeve so as to permit the sleeve to pass into the end pieces in a telescopic action when the seal is under pressure. This so-called telescopic action is brought about by the resistance of the heavier part, 18 (fig. 1), to the pull of parts 2 and 4 as they move with parts 3 and 5 toward each other. These parts are pulled toward each other, giving the rounded appearance shown in figure 1. This pull on part 18 is reflected in some lifting of each end slightly away from the shell. Our analysis of this function is not reconcilable with "plasticity". It says that parts 1 and 2, 3 and 4, 5 and 6, 7 and 8, 9 and 10, have the same relative movements as the folds in figure 1. The angles which these parts form together are reduced to less than right angles in function. In this respect they may be said to fold as in folds. We cannot say, however, that they are "folds or accordion-like" folds. We think these figures are consistent with the intention of the parties as indicated in the stipulations and correspondence. It is clear, however, that it is not intended to include Exhibit 6 in the agreement. We express a contrary intention.

He mentioned having seals in mind which did not have bellows or accordion-like folds. It is admitted that he had Exhibit 6 in mind. Plaintiff apparently made no effort to discover what seals Brummer had in mind. It may not have succeeded had it tried. It made no further substantial specification of the description after receiving this letter from Brummer. It chose to adopt the words suggested by Brummer.

The contract required Brummer to assign any invention "relating" to the device described. The word "relating", however, does not enlarge the description, nor does the language of the paragraph succeeding that in dispute do so.

Plaintiff has the burden of proving a clear and specific contract of assignment which covers Brummer's interest in his invention. (Exhibit 6). The law inclines strongly to the rule that an invention shall be the property of its inventor and only a clear and specific contract to divest him of it will be enforced. Joliet Mfg. Co. v. Dice, 105 Ill. 649; Lindberg Machinery Works v. Lindberg, 305 Ill. App. 543; United States v. Dubilier Condenser Corp. 289 U. S. 179; White Heat Products v. Thomas, 266 Pa. 551; Williston on Contracts (Revised Edition), Vol. 5, p. 4614. These citations involve employer and employee relationship. The principle, however, applies more readily in this case.

It is our conclusion that plaintiff has failed to show a clear and specific agreement under which Brummer is bound to assign his interest in the application patent for Exhibit 6.

For the reasons given the decree is affirmed.

AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

43397

ELLA H. TINKOFF, et al.,

Appellants,

v.

PAUL KORSHAK, et al., etc.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

329 I.A. 272²

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs, husband and wife, instituted an action of trover against defendants doing business as Chicago State Pawnners, Ltd., hereinafter called "Pawnners", to recover damages claimed to have been sustained by them as a result of defendants' illegal conversion for their own use of three fur coats and certain silverware owned by plaintiffs. Defendant Paul Korshak filed a "petition to dismiss plaintiffs' cause of action and counterclaim," praying for a permanent injunction restraining plaintiffs from instituting any further litigation involving the transaction complained of by plaintiffs, on the ground that plaintiffs' suit is vexatious. At the hearing of defendants' petition and counterclaim plaintiffs moved for a change of venue. The trial court denied plaintiffs' motion for change of venue, dismissed the complaint and entered a permanent injunction in accordance with the prayer of defendants' counterclaim. Plaintiffs appeal.

On May 19, 1942 plaintiffs filed a complaint which alleged in substance that subsequent to December 20, 1939 defendants unlawfully converted to their own use property of plaintiffs valued at \$15,000; that various demands for the return of the property were made by plaintiffs upon defendants which were refused.

358. A. 188

•BANKER OF NEW YORK

On June 19, 1944, pursuant to a notice served upon plaintiffs, defendant Paul Korshak appeared before Judge Prystalski and filed a petition to dismiss plaintiffs' cause of action, and a counterclaim alleging substantially as follows: that petitioner (defendant and cross complainant) is general manager of Pawners, organized under the laws of the State of Illinois to operate a pawn business; that Paysoff Tinkoff, one of the plaintiffs, was convicted of a federal offense and was subsequently disbarred from the practice of law; that during the year 1938, Paysoff Tinkoff called at the place of business of Pawners and pledged certain personal property for the purpose of obtaining loans thereon not exceeding \$700; that Paysoff Tinkoff fraudulently represented that his name was E. H. Throop; that had the said Pawners known the identity of Tinkoff they would not have made the loan; that Tinkoff failed to redeem any of the pledges when they became due and Pawners notified him that they would sell the property to satisfy the loan; that on the 25th day of January, 1939 the plaintiffs instituted suit against the defendants in the Circuit Court of Cook County case No. 39 C 787; that the complaint alleged plaintiffs were the lawful owners of the property in question and that defendants wrongfully threatened to sell said personal property in violation of law; that after an extended hearing before the chancellor a decree was entered which found that plaintiffs failed to sustain the issues as set forth in their complaint; that on the 15th day of July, 1940, Ella H. Tinkoff filed a petition under the Bankruptcy Act; that in this cause plaintiff Paysoff Tinkoff filed a claim as a creditor and subsequently, in the same proceeding, filed a petition in which he alleged substantially the same matter set forth in his complaint in Circuit Court case No. 39 C 787;

On June 19, 1944, pursuant to a notice served upon

plaintiffs, defendant Paul Korshak appeared before Judge

Pyatacki and filed a petition to dismiss plaintiffs' cause of action, and a counterclaim arising substantially as follows:

That petitioner (defendant and cross complainant) is general

manager of Lawner, organized under the laws of the State of

Illinois to operate a pawn business; that Payoff Tinkoff, one

of the plaintiffs, was convicted of a Federal offense and was

subsequently disbarred from the practice of law; that during the

year 1938, Payoff Tinkoff called at the place of business of

Lawners and pledged certain personal property for the purpose

of obtaining loans thereon not exceeding \$700; that Payoff

Tinkoff fraudulently represented that his name was J. M. Throp;

that had the said Lawners known the identity of Tinkoff they

would not have made the loan; that Tinkoff failed to redeem any

of the pledges when they became due and Lawners notified him

that they would sell the property to satisfy the loan; that on

the 18th day of January, 1939 the plaintiffs instituted suit

against the defendants in the Circuit Court of Cook County case

No. 38 C 787; that the complaint alleged plaintiffs were the

lawful owners of the property in question and that defendants

wrongfully threatened to sell said personal property in violation

of law; that after an extended hearing before the Chancellor a

decree was entered which found that plaintiffs failed to sustain

the issues set forth in their complaint; that on the 18th day of

July, 1940, J. M. Tinkoff filed a petition under the bankruptcy

act; that in this case plaintiff Payoff Tinkoff filed a claim

as a creditor and subsequently, in the same proceeding, filed

a petition in which he alleged substantially the same matter

set forth in his complaint in Circuit Court case No. 38 C 787;

That upon a hearing the District Court dismissed the petition of Ella H. Tinkoff; that it was judicially determined in the foregoing proceedings that plaintiffs have no right or interest in or to the personal property involved in the instant suit but have persisted in their intention to harass the defendants and cross complainants with useless and unnecessary litigation.

On the same day on which the foregoing petition and counterclaim was filed (June 19, 1944) Judge Prystalski entered an order requiring the plaintiffs to answer said petition within 30 days.

On July 10, 1944 plaintiff filed a written motion to strike defendants' petition to dismiss, alleging inter alia that the issues presented in Circuit Court case No. 39 C 787 and in the bankruptcy proceeding filed by Ella H. Tinkoff were not the same as those raised in the present proceeding and that the law of res adjudicata is not applicable.

On October 5, 1944 the plaintiffs appeared before Judge Fisher pursuant to a notice served upon them by the defendant Paul Korshak and presented a petition for change of venue on the ground of prejudice of the presiding judge. After denying the petition for change of venue, the trial court entered an order which found that plaintiffs did not answer defendants' petition within 30 days; (1) "that plaintiffs' cause of action was not brought in good faith and was instituted for the sole purpose of harassment, annoyance, oppression, and to cause unnecessary litigation is taken as confessed as against the plaintiffs; (2) that the above entitled cause is to be dismissed at the costs of the plaintiffs herein; (3) that the plaintiffs, their attorney, agents and employees are hereby enjoined and restrained permanently from instituting any action, cause or proceedings against Paul Korshak or any of the other defendants in the above cause on the

That upon a hearing the District Court dismissed the petition of
E. E. Tinkoff; that it was judicially determined in the fore-
going proceedings that plaintiffs have no right or interest in
or to the personal property involved in the instant suit but
have exercised in their intention to harass the defendants and
cross complainants with useless and unnecessary litigation.

On the same day on which the foregoing petition and
counterclaim was filed (June 19, 1944) Judge Ryland entered
an order requiring the plaintiffs to show cause and petition within
30 days.

On July 19, 1944 plaintiffs filed a written motion to
strike defendants' petition to dismiss, alleging that the
issues presented in District Court were No. 32, 37 and in
the bankruptcy proceeding filed by E. E. Tinkoff were not the
same as those raised in the present proceeding and that the law
of non estoppel is not applicable.

On October 2, 1944 the plaintiffs appeared before
Judge Fisher pursuant to a notice served upon them by the defendant
Paul L. Lohman and presented a petition for change of venue on the
ground of prejudice of the presiding judge. After denying the
petition for change of venue, the trial court entered an order
which found that plaintiffs did not answer defendants' petition
within 30 days; (1) "that plaintiffs' cause of action was not
brought in good faith and was instituted for the sole purpose of
harassment, annoyance, oppression, and to cause unnecessary
litigation to be taken as evidenced by complaint against the plaintiffs; (2)
that the above entitled cause is to be dismissed at the cost of
the plaintiffs herein; (3) that the plaintiffs, their attorney,
agents and employees are hereby enjoined and restrained permanently
from instituting any action, cause or proceeding against Paul
Lohman or any of the other defendants in the above cause on the

basis of certain articles hereinafter described; (4) it is further ordered that the purported plaintiffs' motion to strike defendants' petition to dismiss, which was filed by plaintiffs without notice to defendants, be and the same is hereby stricken from the files."

Plaintiffs' principal contention is that the court erred in refusing to grant a change of venue. We shall first consider the state of the pleadings at the time the court denied plaintiffs' motion for a change of venue.

It should be noted that the order of June 19, 1944 required the plaintiffs to answer defendants' petition and counterclaim. It also provided that pending the disposition of the issues raised by the petition and answer to be filed, the proceedings in the cause are stayed and that the defendants are relieved from the necessity of filing any pleadings to the complaint until the termination of the issues raised by the petition and counterclaim of Paul Morshak and the answer of the plaintiffs. Section 32 of the Civil Practice Act provides that the first pleading of the defendant shall be designated an answer. Paragraph (3) of the same section provides that pleadings shall be liberally construed with a view to doing substantial justice between the parties. In the regular order of pleading defendants' answer should have been filed before the counterclaim or contemporaneously with it. (Winemiller v. Mossberger, 355 Ill. 145-155; 10 R. C. L. sec. 266, p. 489.) An examination of the record does not disclose any reason for relieving defendants from filing an answer to the complaint. In any event the written motion of plaintiffs filed July 10, 1944, to dismiss the defendants' petition to dismiss the complaint, raised issues for the first time which in the regular order of pleading should have been raised by defendants' answer to the complaint.

basis of certain articles hereinafter described; (4) it is further ordered that the purported plaintiffs' motion to strike defendants' petition to dismiss, which was filed by plaintiffs without notice to defendants, be and the same is hereby stricken from the files."

Plaintiffs' principal contention is that the court erred in refusing to grant a change of venue. We shall first consider the state of the allegations at the time the court denied plaintiffs' motion for a change of venue.

It should be noted that the order of June 15, 1944, requiring the plaintiffs to answer defendants' petition and counter-claim. It also provided that pending the disposition of the issues raised by the petition and answer to be filed, the proceedings in the case are stayed and that the defendants are relieved from the necessity of filing any pleading to the complaint until the resolution of the issues raised by the petition and counterclaim of Paul Korshak and the answer of the plaintiffs. Section 10 of the Civil Practice Act provides that the first pleading of the defendant shall be designated an answer. Paragraph (3) of the same section provides that pleadings shall be liberally construed with a view to doing substantial justice between the parties. In the regular order of pleading defendants' answer should have been filed before the counterclaim or counterclaimously with it. (Franklin v. Newspaper, 100 Ill. 145-156; 10 N. E. 2d, 252, 253, 254.) An examination of the record does not disclose any reason for relieving defendants from filing an answer to the complaint. In any event the written motion of plaintiffs filed July 10, 1944, to dismiss the defendants' petition to dismiss the complaint, raised issues for the first time which in the regular order of pleading should have been raised by defendants' answer to the complaint.

In their original and supplemental briefs defendants assert (1) that plaintiffs' motion to strike was a frivolous document lacking the essentials of a motion to strike; (2) that the court must construe the word "answer" in its limited sense only; and (3) that if the word "answer" be taken in its enlarged sense so as to include a motion to strike, then it admitted all the facts well pleaded in defendants' petition and counterclaim. Defendants say that under the facts of this particular case the court must construe the word "answer" in the order of June 19, 1944 in the strict and limited sense ordinarily used in chancery proceedings. In support of their position they rely on Dunn v. Keegin, 4 Ill. 292; Archer v. Claflin, 31 Ill. 306; Dunne v. County of Rock Island, 273 Ill. 53; Noll v. Peterson, 338 Ill. 552, 572. In the Dunn case it appears that the defendants withdrew a demurrer which they had previously filed and on their motion they were given time to answer at the next term, and in default of filing an answer their default was to be entered. There the court said, page 295:

"This entry does not appear like an ordinary rule to plead, answer, or demur, by a certain day, according to the usual course of chancery proceedings; but is in the nature of a stipulation between the parties, with the acquiescence of the court, made at the suggestion of the defendants, and for their benefit, that they should have the time of answering extended until the 1st day of June next thereafter * * *."

In the present case, so far as the record shows, plaintiffs did not suggest that they be required to answer, nor was it for their benefit. In the Archer case the facts are dissimilar to those in the case at bar. There the court held (p. 313) that if the defense was of a dilatory character, not going to the merits, it was defendants' duty to have interposed it at the first term. In the other cases cited the facts are not only dissimilar but we are unable to find anything in them to support defendants' contentions.

In their original and supplemental briefs defendants assert (1) that plaintiffs' motion to strike was a frivolous document lacking the essentials of a motion to strike; (2) that the court must construe the word "answer" in its limited sense only; and (3) that if the word "answer" be taken in its enlarged sense so as to include a motion to strike, then it admitted all the facts well pleaded in defendants' petition and counterclaim. Defendants say that under the facts of this particular case the court must construe the word "answer" in the order of June 10, 1944 in the strict and limited sense ordinarily used in chancery proceedings. In support of their position they rely on Dunn v. Keen, 4 Ill. 282; Archer v. Quilling, 21 Ill. 308; Dunn v. County of Cook, 273 Ill. 53; Moff v. Peterson, 338 Ill. 552, 572. In the Dunn case it appears that the defendant withdrew a demurrer which they had previously filed and on their motion they were given time to answer at the next term, and in default of filing an answer their default was to be entered. There the court said, page 552:

"This entry does not appear like an ordinary rule to plead, answer, or demur, by a certain day, according to the usual course of chancery proceedings; but is in the nature of a stipulation between the parties, with the acquiescence of the court, made at the suggestion of the defendant, and for their benefit, that they should have the time of answering extended until the first day of June next thereafter."

In the present case, so far as the record shows, plaintiffs did not suggest that they be required to answer, nor was it for their benefit. In the Archer case the facts are dissimilar to those in the case at bar. There the court held (p. 313) that if the defense was of a dilatory character, not going to the merits, it was defendants' duty to have interposed it at the first term. In the other cases cited the facts are not only dissimilar but we are unable to find anything in them to support defendants' contentions.

Under the former practice the rule was well established that a defendant had a right to demur when he was under a rule to answer, and the filing either of an answer, plea or demurrer was a compliance with the rule (Dunn v. Keegin, 4 Ill. 292; Bracken v. Kennedy, 4 Ill. 558, 563.) Under section 169, ch. 110 Ill. Rev. Stats. 1943 (Ill. Bar Ass'n.), the Civil Practice Act, the motion to strike has supplanted the demurrer. Although parts of plaintiffs' motion to strike defendants' petition and counterclaim appear objectionable, it does allege in the fourth paragraph in the same general language as that used by defendants in their counterclaim, that the issues raised in the case at bar are not the same as those presented in Circuit Court case No. 39 C 787 and in the bankruptcy proceedings as set forth in defendants' counterclaim. These allegations, if true, constitute a meritorious defense to defendants' counterclaim. Defendants urge that plaintiffs made no request for leave to plead over after their pleading was stricken. When plaintiffs presented their petition for change of venue they were not in default since in our view they had a proper pleading on file.

So far as appears from the record, plaintiffs' petition for a change of venue was in proper form and duly verified as required by the statute. Inasmuch as plaintiffs were not in default and the cause had not been set for trial, it was presented in apt time.

In the recent case of Talbot v. Stanton, 327 Ill. App. 491, involving a motion for a change of venue, this court in adverting to People v. Scott, 326 Ill. 341, said:

"These provisions of the statute should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as not to defeat the right attempted to be attained therein."

For the reasons stated, the order entered October 5, 1944 is reversed and the cause remanded with directions to grant a change of venue, and with directions to proceed in a manner not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

KILEY, P.J. AND BURKE, J. CONCUR.

Under the former practice the rule was well established that a defendant had a right to demand when he was under a rule to answer, and was filing either of an answer, plea or demurrer was a compliance with the rule (Levy v. Kessler, 4 Ill. 292; Bracken v. Kennedy, 4 Ill. 288, 363.) Under section 139, ch. 110 Ill. Rev. Stat. 1943 (Ill. Sup. Ct.), the Civil Practice Act, the motion to strike has supplanted the demurrer. Although parts of plaintiff's motion to strike defendant's petition and counterclaim appear objectionable, it does alike in the fourth paragraph in the same general language as that used by defendant in their counterclaim, that the issues raised in the case at bar are not the same as those presented in Circuit Court case No. 29 C 787 and in the bankruptcy proceedings as set forth in defendant's counterclaim. These allegations, if true, constitute a meritorious defense to defendant's counterclaim. Defendant urges that plaintiff made no request for leave to plead over after their pleading was stricken. When plaintiff presented their petition for change of venue they were not in default since in our view they had a proper pleading on file. So far as appears from the record, plaintiff's petition for a change of venue was in proper form and duly verified as required by the statute. Inasmuch as plaintiff's were not in default and the cause had not been set for trial, it was presented in not time. In the recent case of Walsh v. Dalton, 327 Ill. App. 421, involving a motion for a change of venue, this court in reversing to People v. Scott, 328 Ill. 341, said:

"These provisions of the statute should receive a broad and liberal rather than a technical and strict construction, and should be construed so as not to defeat the right attempted to be obtained therein." For the reasons stated, the order entered October 1, 1944 is reversed and the cause remanded with directions to grant a change of venue, and with directions to proceed in a manner not inconsistent with this opinion.

REVEREND AND HONORABLE JUSTICES

43475

ARTIE LAMPKIN, RALPH W. HILL,
HENRY J. SMOTHERS and EDDIE
KENNEDY,

Appellees,

v.

THOMAS J. FRIEL and CHARLES G.
RENSHAM, as Trustees, etc., et al.,
doing business as CHICAGO SURFACE
LINES,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

391
329 I.A. 273'

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action arising out of a collision, September 24, 1943, between an automobile and a street car at Pershing Road (39th Street) and Vincennes Avenue in Chicago. The jury returned verdicts of guilty against defendants and in favor of each plaintiff. Lampkin's damages were assessed at \$3,500, Hill's at \$1,500, Smothers' at \$900 and Kennedy's at \$900. Judgments were entered on the verdicts and defendants have appealed.

The case went to the jury on the issues whether defendants were negligent in failing to keep a proper lookout for danger and in operating the street car. Plaintiff's charges of wilful and wanton conduct were withdrawn. Defendants' defense of wilful and wanton conduct on the part of plaintiffs was allowed to stand over the motion of plaintiffs to strike it.

Plaintiffs at the time of the accident were employees of the National Malleable Steel Mill Corporation at 14th Street and 52nd Avenue in Cicero, Illinois. They used Kennedy's Ford automobile under a share-the-expenses plan for transportation to and from their place of employment. The morning of the accident Kennedy was driving. He had picked the others up and was driving north on Vincennes Avenue. Defendants' street car was traveling west on the north tracks in Pershing Road. The collision occurred

ARTIE LAMBERT, alias "Slim",
KENT J. LAMBERT and LAMBERT,
Defendants.

Appellants.

v.

THOMAS J. KELLY and CHARLES C.
KELLY, as Trustees, etc., et al.,
Doing business as KELLY TRUST
LIMITED,
Appellees.

Appellants.

APPELLANT
KELLY TRUST

APPELLEE

3221 A. 272

MR. JUSTICE THOMAS KELLY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action arising out of a collision, December 24, 1923, between an automobile and a street car at parking place (30th Street) and Vincennes Avenue in Chicago. The jury returned verdicts of liability against defendants and in favor of each plaintiff. Damages awarded were assessed at \$2,500, KELLY at \$1,500, and KELLY at \$1,000. Judgment was entered on the verdicts and damages were assessed.

The case went to the jury on the issues whether defendants were negligent in failing to keep a proper lookout for street car in operating the street car. Plaintiff's charges of willful and wanton conduct were withdrawn. Defendants' defense of willful and wanton conduct on the part of plaintiff was allowed to stand over the motion of plaintiff to strike it.

Plaintiff at the time of the accident were employees of the National Automobile Steel Mill Corporation at 14th Street and Vincennes Avenue in Chicago, Illinois. They used Kennedy's Ford automobile under a three-day-expiration plan for transportation to and from their place of employment. The morning of the accident Kennedy was driving. He had picked the others up and was driving north on Vincennes Avenue. Defendants' street car was traveling west on the north track in parking place. The collision occurred

in the intersection. The automobile was pushed west in Pershing Road and "jammed" into an automobile parked on the north side of Pershing Road, west of the intersection. The right side of Kennedy's automobile was demolished. All plaintiffs were injured in some degree.

Defendants contend that plaintiffs were in a joint enterprise at the time of the accident. They argue accordingly that contributory negligence on the part of Kennedy in the operation of the automobile was imputable to the other plaintiffs. They insist that Kennedy was guilty of contributory negligence as a matter of law, or that in any event the jury's finding that Kennedy was not guilty of contributory negligence is against the manifest weight of the evidence.

The morning of the accident was misty and foggy. It was dark and the street car and automobile lights were on.

Kennedy testified that he had been driving since he was 14 years old, 6 years in Chicago; that he had never been in an accident before and his car was in good mechanical condition; that driving north in Vincennes Avenue at about 20 miles an hour he stopped pursuant to the stop sign at Oakwood Boulevard, a block south of Pershing Road; that he slowed down to "practically walking speed" pursuant to the Slow sign at Pershing Road; that being unable to see both directions he rolled at that speed into the intersection, looked west and saw no traffic, looked east and noticed a street car traveling west; that when he first saw the street car he was at the south side of 39th Street and it was 100 or 125 feet east of Vincennes; that some people were waiting at the street car loading zone at the northeast corner of the intersection; that after his first view of the street car

in the intersection. The automobile was turned west in turning
road and "jammed" into an automobile parked on the north side
of traveling road, west of the intersection. The right side of
Kennedy's automobile was demolished. All plaintiffs were injured
in some degree.

Defendants contend that plaintiffs were in a joint
enterprise at the time of the accident. They argue accordingly
that contributory negligence on the part of Kennedy in the oper-
ation of the automobile was imputable to the other plaintiffs.
They insist that Kennedy was guilty of contributory negligence
as a matter of law, or that in any event the jury's finding that
Kennedy was not guilty of contributory negligence is against the
manifest weight of the evidence.

The morning of the accident was misty and foggy. It
was dark and the street car and automobile lights were on.
Kennedy testified that he had been driving since he
was 16 years old, 8 years in Chicago; that he had never been in
an accident before and his car was in good mechanical condition;
that having north in "Lincoln Avenue at about 10 miles an hour
he stopped at a red light at Oakwood Boulevard,
block south of "Traveling Road"; that he slowed down to "practically
walking speed" pursuant to the flow sign at "Traveling Road"; that
being unable to see both directions he relied at that speed into
the intersection, looked west and saw no traffic, looked east
and noticed a street car traveling west; that when he first saw
the street car he was at the south side of 36th Street and it
was 100 or 125 feet west of Lincoln; that some people were
waiting at the street car loading zone at the northeast corner
of the intersection; that after his first view of the street car

he increased his speed and continued to cross the intersection; that he next looked east as his front wheels were entering the eastbound tracks and the street car was then 40 or 50 feet east of Vincennes Avenue; that he did not know at what speed the street car was then moving; that the street car slowed down as he looked the second time and he "really expected" it to stop; that he looked straight ahead after the second view to see where he was going; that he knew he was plenty far enough away to get across without racing his motor and "didn't know" the street car would hit the automobile; and that when the collision occurred the automobile was going 12 miles or so an hour. We think that the foregoing testimony was sufficient to take to the jury the question of plaintiff's due care.

In addition to the foregoing, Kennedy testified that he did not blow his horn; that he knew the intersection and its surroundings; that he did not hear the sound of the street car gong; that he did not look after his second view since he expected the car to stop, although he did not know its speed; and that his automobile was in control so that he could stop it almost instantly. Defendants argue that this testimony indicates that Kennedy gambled that the street car would stop and gambled that he could beat it through the intersection.

The other plaintiffs substantially corroborated Kennedy's testimony. There was additional evidence that the street car was proceeding west at 30 or 35 miles an hour. Plaintiffs' testimony was corroborated by a Baptist minister with respect to the people waiting for the street car and to Kennedy's conduct pursuant to the Slow sign. This witness testified that the collision occurred when the automobile was on the north track of the westbound tracks and that the front of the street car jumped the track northwest.

he increased his speed and continued to cross the intersection; that he next looked east as his front wheels were entering the eastbound tracks and the street car was then 40 or 50 feet east of Vincennes Avenue; that he did not know at what speed the street car was then moving; that the street car slowed down as he looked the second time and he "really expected" it to stop; that he looked straight ahead after the second view to see where he was going; that he knew he was going far enough way to get across without seeing his motor and "didn't know" the street car would hit the automobile; and that when the collision occurred the automobile was going 12 miles or so an hour. He thinks that the foregoing testimony was sufficient to take to the jury the question of Plaintiff's due care.

In addition to the foregoing, Kennedy testified that he did not blow his horn; that he knew the intersection and its surroundings; that he did not hear the sound of the street car going; that he did not look after his second view since he expected the car to stop, although he did not know its speed; and that his automobile was in control as that he could stop it almost instantly. Defendants argue that his testimony insofar as Kennedy admitted that the street car would stop and admitted that he could beat it through the intersection.

The other Plaintiff substantially corroborated Kennedy's testimony. There are additional evidence that the street car was proceeding east at 30 or 35 miles an hour. Plaintiff's testimony was corroborated by a Capital Minister with respect to the people waiting for the street car and to Kennedy's conduct subsequent to the blow up. This witness testified that the collision occurred when the automobile was on the north track of the westbound tracks and that the front of the street car jumped the track northwest.

Two other witnesses, co-employees of plaintiffs, testified that Kennedy's car was proceeding north on Vincennes Avenue just prior to the accident; that as their car approached Pershing Road the red light on the back of Kennedy's car was blinking; and that they saw the street car hit the automobile and "drag" it 50 to 75 feet west and jam it into the parked automobile. One of these defendants testified that they were driving about 20 miles an hour and kept about 150 feet behind Kennedy's car. This corroborates the testimony of plaintiffs as to their speed. One police officer testified for defendants that Kennedy told him that the speed of the "car" at the time of the accident was 20 miles an hour. It is apparent from the record that the "car" referred to plaintiffs' automobile. Another police officer testified that one of the plaintiffs told him that when he first observed the street car it was 30 or 40 feet east "of our car."

The street car in question was a so-called "one man car." The motorman-conductor testified that he first saw the automobile when it was about 40 feet south of the crossing and the front of the street car was "going over" the east cross walk of Vincennes; that pursuant to custom he had shut off the power and sounded the bell going into the crossing; that he saw the automobile lights and "thought" it would slow down; that the automobile was coming "fast", but he did not know how fast; that he was going about 20 miles an hour in the block east of Vincennes and reduced his speed by two miles when he shut off the power and could stop in 20 or 30 feet at 20 miles an hour; that after his first view of the automobile, he did not look at it again; that he did not see any people waiting at the loading zone; that the right side of the automobile struck the left corner of the street car and derailed it; and that the only damage to the street car was "scratches" on the left front corner.

The other witnesses, co-employees of plaintiffs, testified that Kennedy's car was proceeding north on Wisconsin Avenue just prior to the accident; that as their car approached turning right the red light on the back of Kennedy's car was blinking; and that they saw the street car hit the automobile and "bang" it 50 to 75 feet west and jam it into the parked automobile. One of these defendants testified that they were driving about 30 miles an hour and about 150 feet behind Kennedy's car. This corroborated the testimony of plaintiffs as to their speed. One police officer testified that Kennedy told him that the corner of the "car" at the time of the accident was 30 miles an hour. It is apparent from the record that the "car" referred to plaintiffs' automobile. Another police officer testified that one of the plaintiffs told him that when he first observed the street car in the 30 or 40 feet east of our car."

The street car in question was a so-called "one man car." The witness-for-defendant testified that he first saw the automobile when it was about 25 feet south of the crossing and the front of the street car was "going over" the east cross walk of Wisconsin; that defendant's witness is not sure if the power and sounded the bell going into the crossing; that he saw the automobile 15 feet and "stopped" it would also mean; that the automobile was coming "fast" but he did not know how fast; that he was going about 30 miles an hour in the block east of Wisconsin and reached his speed by two miles when he shut off the power and could stop in 20 or 30 feet at 30 miles an hour; that after his first view of the automobile, he did not look at it again; that he did not see any people waiting at the loading stand; that the right side of the automobile struck the left corner of the street car and derailed it; and that the only damage to the street car was sustained in the left front corner.

Photographs of the automobile in evidence show that the center of its right side bore the full force of the blow. Cross-examinations of witnesses for both sides developed some inconsistencies in the testimony. We think, however, that the substantial disagreements appear in the evidence we have recited. We think that evidence is sufficient to show that there is no merit in the contention of defendants that a finding that Kennedy was in the exercise of due care was against the manifest weight of the evidence.

While the motorman-conductor was testifying he was asked by defense counsel whether the "men in the automobile" said anything to him just after the collision. He answered that the first man who got out of the demolished automobile said, "What in the world-." At this point counsel for plaintiffs' objection was sustained. There was no showing as to what the witness would have testified had he been allowed to proceed. We cannot say that, had the offer been made, the court would have persisted in its ruling. We cannot say whether, if the court was in error, the ruling was prejudicial, or to what degree. This conclusion is not affected by any reasons given by defense counsel at the trial as to why the testimony should have been admitted. Since the offer of proof was not made, we shall not consider this contention. Chicago City Railway Company v. Carroll, 206 Ill. 318; Owens v. Guernsey, 241 Ill. App. 477; and Whyte v. Rogers, 303 Ill. App. 115. Our conclusion is not inconsistent with the holdings in Hartnett v. Boston Store of Chicago, 265 Ill. 331, cited by defendants, nor with the authorities cited in it.

Defendants contend also that an instruction given on behalf of the plaintiffs failed to limit recoverable damages to

photographs of the automobile in evidence show that the center of its right side bore the full force of the blow. Cross-examinations of witnesses for both sides developed some inconsistencies in the testimony. We think, however, that the substantial discrepancies appear in the evidence we have recited. We think that evidence is sufficient to show that there is no merit in the contention of defendants that a finding that Kennedy was in the exercise of due care was against the manifest weight of the evidence.

While the motorist-conductor was testifying he was asked by defense counsel whether the "man in the automobile" said anything to him just after the collision. He answered that the first man who got out of the demolished automobile said, "What in the world." At this point counsel for plaintiffs' objection was sustained. There was no showing as to what the witness would have testified had he been allowed to proceed. We cannot say that, had the offer been made, the court would have erred in its ruling. We cannot say whether, if the court was in error, the ruling was prejudicial, or to what degree. This conclusion is not affected by any reasons given by defense counsel at the trial as to why the testimony should have been admitted. Since the offer of proof was not made, we shall not consider this contention. Chicago City Railway Company v. Carroll, 103 Ill. 316; Quinn v. Querry, 74 Ill. App. 477; and Hay v. Hay, 303 Ill. App. 116. Our conclusion is not inconsistent with the holdings in Garrett v. Boston Store of Chicago, 285 Ill. 321, cited by defendants, nor with the authorities cited in it. Defendants contend also that an instruction given on behalf of the plaintiffs failed to limit recoverable damages to

what each plaintiff may have individually sustained and specifically did not limit the recovery of damages for the demolished automobile to Kennedy. An instruction told the jury they should take into consideration in determining the amount of plaintiff's damages, among other things, " * * * the damage to the automobile, if any, as proven by a preponderance of the evidence * * *." It is true that the instruction did not limit the recovery for this element to Kennedy. There is no complaint that any of the verdicts is excessive. Defendants have not abstracted the medical testimony. We think it was plain to the jury from the evidence that Kennedy alone was the owner of the automobile. The instruction was carelessly drawn. Under all the circumstances, however, we can hardly say that the jury was misled to the prejudice of the defendants.

For the reasons given the judgments are affirmed.

JUDGMENTS AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

what each plaintiff may have individually sustained and collectively did not limit the recovery of damages for the damaged automobile to Kennedy. An instruction told the jury they should take into consideration in determining the amount of plaintiff's damages, among other things, " * * * the damage to the automobile, if any, as proven by a preponderance of the evidence * * * ". It is true that the instruction did not limit the recovery for this element to Kennedy. There is no complaint that any of the verdicts is excessive. Defendants have not rebutted the medical testimony. We think it was plain to the jury from the evidence that Kennedy alone was the owner of the automobile. The instruction was carefully drawn. Under all the circumstances, however, we can hardly say that the jury was misled to the prejudice of the defendants.

For the reasons given the judgments are affirmed.

JUDGMENTS AFFIRMED.

LEWIS AND CLARK, JR., JUDGES.

43529

VILLAGE OF FOREST PARK, a
municipal corporation,

Appellant,

v.

TOM COLLIS, JR., BEN BERLINER, BEN J.
HOFFMAN, AUGUST J. CALCAGNO, THEODORE
DANNENBERG, HENRY HERMAN DESENS, PAUL
E. PRICE, WILLIAM MCKINLEY, LOUIS
DENNEN, F. J. BROPHY and COMPANY, a
Corporation, WESTERN CASUALTY & SURETY
COMPANY, a Corporation, and CONTINENTAL
CASUALTY COMPANY, a Corporation,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

399
329 I.A. 273²

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover moneys which the Village claims is due it because of a conspiracy among former Village officials and others, pursuant to which it was defrauded and because the defendant sureties are liable upon their bonds for the unfaithful acts of their principals, the former officials. Summary judgments were entered against the Village upon Counts II and III of its second amended complaint. It has appealed from these judgments.

During the period from May 1, 1939 to and including April 30, 1943, Collis was Mayor, Berliner, Hoffman, Calcagno and Dannenberg were Commissioners and Desens was Treasurer of the plaintiff Village. From December 11, 1939 to and including April 30, 1943, Price was the Village Attorney.

June 9, 1941, F. J. Brophy and Company, in the municipal bond business, sent a written proposal to the Village Council. It offered to loan funds to the Village for the extension, improvement and betterment of its water and sanitary systems. This Company proposed that the loans be evidenced by Village 4½ percent Water and Sewer 4½/revenue bonds. On the same day the Village Council accepted the proposal "in its entirety."

VILLAGE OF NORTH BAY, a
municipal corporation,

Defendant,

v.

TOM COLLIS, JR., BEN BELLAMY, BEN J.
ROTHMAN, AUGUST J. SALAMONE, GEORGE
HARRISON, RICHARD HARRIS, EARL
E. PRICE, WILLIAM McILWAIN, LOUIS
BARKER, J. J. BROPHY and COMPANY, a
corporation, WESTERN SECURITY & TRUST
COMPANY, a corporation, and CONTINENTAL
NATURAL GAS COMPANY, a corporation,

Plaintiffs.

CIRCUIT COURT

COOK COUNTY.

MR. PRESIDING JUDGE AILEY delivered the opinion of the court.

This is an action to recover money which the Village
claims is due it because of a conspiracy among former Village
officials and others, pursuant to which it was defrauded and
because the defendant executes are liable upon their bonds for
the unlawful acts of their principals, the former officials.
Summary judgments were entered against the village upon Counts
II and III of its second amended complaint. It has appealed from
these judgments.

During the period from May 1, 1939 to and including
April 30, 1943, Collis was Mayor, Barkner, Hoffman, Salomone and
Barkner were Commissioners and Brown was Treasurer of the
plaintiff Village. From December 11, 1939 to and including April
30, 1943, Price was the Village Attorney.

June 8, 1941, J. J. Brophy and Company, in the municipal
bond business, sent a written proposal to the Village Council. It
offered to loan funds to the Village for the extension, improvement
and betterment of its water and sanitary systems. This Company
proposed that the loan be evidenced by Village 4 1/2 percent water and
sewer revenue bonds. On the same day the Village Council accepted
the proposal "in its entirety."

Pursuant to the proposal, the Council passed ordinances October 15, 1941, providing for the issuance of \$125,000 water and \$250,000 sewer revenue bonds. December 31, 1941 the entire issues were delivered to Brophy and Company. The Village received in exchange \$127,597.24 and \$247,805.51 respectively. These sums were deposited, pursuant to the ordinances, in a bank account designated "Water and Sewerage Systems Construction Fund."

In Count I the Village charges that Brophy and Company, Collis, Berliner, Hoffman, Calcagno, Dannenberg, Desens, Price and Attorneys McKinley and Dennen conspired together to injure plaintiff and deprive it of a \$60,000 premium which Brophy and Company realized through a resale of the Village bonds; that the premium was possible through the excess, unfair and unreasonable interest rates charged in the bonds to the Village; that the ordinance providing for the issuance of the sewerage bonds was not published in the Forest Park Review, the official village newspaper; that the named officials made no reasonable effort to secure "a competitive bid"; and that all the defendants named in the count shared the premium with Brophy and Company.

In Count II plaintiff charges Collis, Berliner, Hoffman, Calcagno, Dannenberg, Desens, Price, McKinley and Dennen with a further conspiracy. It alleges that on various dates, commencing December 31, 1941, the named Village officials, except Price, caused vouchers to be drawn, payable to McKinley and Dennen and to, or for, Price in the amount of \$25,660; that these vouchers purported to be for legal services; that the attorneys rendered no services described in the Village Attorney Ordinance; and submitted no bills; that the payment of the vouchers were made without authority out of the proceeds of the bonds; and that no resolutions were recorded creating obligations to issue or pay the vouchers; and that the defendants knew this fact at the time.

Pursuant to the process, the Council passed ordinances

October 18, 1941, providing for the issuance of \$125,000 water and \$250,000 sewer revenue bonds. December 31, 1941 the entire issues were delivered to Brophy and Company. The Village received in exchange \$27,537.24 and \$47,808.31 respectively. These sums were deposited, pursuant to the ordinance, in a bank account

designated "Water and Sewerage Systems Construction Fund."

In Count I the Village charges that Brophy and Company,

Gollis, Berliner, Hoffman, Galeagne, Dannenberg, Desena, Price

and Attorney McKinley and Dennen conspired together to injure

plaintiff and deprive it of a \$50,000 premium which Brophy and

Company realized through a resale of the Village bonds; that

the premium was possible through the excess, unfair and unreasonable

interest rates charged in the bonds to the Village; that the

ordinance providing for the issuance of the sewerage bonds was

not published in the Forest Park Review, the official village news-

paper; that the named officials made no reasonable effort to secure

"a competitive bid"; and that all the defendants named in the

suit shared the premium with Brophy and Company.

In Count II plaintiff charges Gollis, Berliner, Hoffman,

Galeagne, Dannenberg, Desena, Price, McKinley and Dennen with a

further conspiracy. It alleges that on various dates, commencing

December 31, 1941, the named Village officials, except Price,

caused vouchers to be drawn, payable to McKinley and Dennen and

to, or for, Price in the amount of \$5,550; that these vouchers

purported to be for legal services; that the attorneys rendered

no services described in the Village Attorney Ordinance; and sub-

mitted no bills; that the payment of the vouchers was made without

authority out of the proceeds of the bonds; and that no resolutions

were recorded creating obligations to issue or pay the vouchers;

and that the defendants knew this fact at the time.

Count III seeks recovery on the bonds because the principals therein did not perform their duties as Village officials well and faithfully.

Price, McKinley and Dennen filed their joint and several answers. They admitted lack of publication in the Official newspaper, but averred that publication was pursuant to statute. They denied that they conspired in any way against the Village or shared in any premium of Brophy and Company or did anything to injure the Village or deprive it of money. They made further averments substantially the same as the statements in their affidavits hereafter referred to. The other defendants made motions to dismiss, or to strike, or both, the second amended complaint.

February 27, 1945 Price, McKinley and Dennen moved for summary judgment on Count II. In support of the motion Price filed an affidavit stating that the proceeds of the only two vouchers payable to him did not represent attorney fees but reimbursals for expenses. McKinley filed an affidavit setting forth the resolution by which he and Dennen were employed by the Village for services pertaining to the bond issues; the passage of the bond ordinances; and a general description of the legal services rendered, the submission of bills for legal services, the proceedings of the Village Council receiving and approving the bills, the drawing of the vouchers against the Bond Fund, and receipt of the vouchers by him and Dennen. Attached to this affidavit were copies of the bills submitted.

March 13, 1945, Campagna, Village Clerk and Comptroller, filed counter affidavits stating that during the time Price was Village Attorney, he was also a partner of McKinley and Dennen in the practice of law in Chicago and on information and belief that the Village Attorney's fees were divided between the parties. The Village Attorney ordinance was set forth. It provides that the Village Attorney shall have authority, with approval of the Council, to appoint necessary special counsel "to * * * assist in conducting any suit or other judicial proceedings in which the Village is

any suit or other judicial proceedings in which the Village is to appoint necessary special counsel "to " " assist in conducting Village Attorney shall have authority, with approval of the Council, Village Attorney ordinance was set forth. It provides that the the Village Attorney's fees were divided between the parties. The the practice of law in Chicago and on information and belief that Village Attorney, he was also a partner of McKinley and Dennen in filed counter affidavit stating that during the time Price was March 18, 1945, Comptroller, Village Clerk and Comptroller, Attached to this affidavit were copies of the bills submitted, against the bond fund, and receipt of the vouchers by him and Dennen. receiving and approving the bills, the drawing of the vouchers of bills for legal services, the proceedings of the Village Council of general description of the legal services rendered, the submission pertaining to the bond issues; the passage of the bond ordinances; and a by which he and Dennen were employed by the Village for services expenses. McKinley filed an affidavit setting forth the resolution payable to him did not represent attorney fees but reimbursements for an affidavit stating that the proceeds of the only two vouchers summary judgment on Count II. In support of the motion Price filed February 27, 1945 Price, McKinley and Dennen moved for to strike, or both, the second amended complaint. after referred to. The other defendants made motions to dismiss, or substantially the same as the statements in their affidavits hereto the Village or deprive it of money. They made further averments in any premises of Brophy and Company or did anything to injure denied that they conspired in any way against the Village or shared paper, but averred that publication was pursuant to statute. They answers. They admitted lack of publication in the official news- Price, McKinley and Dennen filed their joint and several principals therein did not perform their duties as Village officials Count III seeks recovery on the bonds because the

a party or directly interested." It expressly provides that special counsel may include any firm of attorneys of which the Village Attorney may be a member.

March 14 the trial court entered summary judgment for movants' costs.

March 18, 1945 Berlinger, Hoffman, Collis, Dannenberg, and Calzagno moved for dismissal of Count II, or for summary judgments on the ground that the summary judgment of March 14 was a complete and final adjudication on the merits of all plaintiff's claims in Count II; that the judgment determined that the payments to Price, McKinley and Dennen were proper; and that plaintiff is estopped by that judgment to recover against the defendants in Count II. March 28th Desens and Continental Casualty did likewise. Plaintiff objected that in addition to the unlawful payments, Count II charged a conspiracy to defraud the Village and deprive it of its money; that the Summary Judgment Act gave no jurisdiction to the trial court to enter a summary judgment against plaintiff on its allegations of fraud and conspiracy; and that to that extent, the allegations in Count II were undetermined by the summary judgment and the moving defendants should answer those charges. April 19th the trial court entered summary judgments as prayed. It ordered Dannenberg, Calzagno, Collis, Berliner and Hoffman to answer Count I of the second amended complaint.

Plaintiff contends that this action does not fall within the classes of actions in the Summary Judgments Act and that the court was, therefore, without jurisdiction to enter any of the judgments. We agree with defendants that plaintiff waived this point as to the summary judgment in favor of McKinley, Price and Dennen by filing counter-affidavits to those filed by them under

a party or directly interested." It expressly provides that special

counsel may include any firm of attorneys of which the Village

Attorney may be a member.

March 14 the trial court entered summary judgment for

movants, costs.

March 18, 1946 Berlinger, Hoffman, Collins, Bannenberg,

and Calagano moved for dismissal of Count II, or for summary

judgment on the ground that the summary judgment of March 14 was

a complete and final adjudication on the merits of all plaintiff's

claims in Count II; that the judgment determined that the payments

to Price, McKinley and Bannan were proper; and that plaintiff is

estopped by that judgment to recover against the defendants in

Count II. March 28th Deane and Continental Casualty did likewise.

Plaintiff objected that in addition to the unlawful payments,

Count XI charged a conspiracy to defraud the Village and deprive it

of its money; that the summary judgment did give no indication to

the trial court to enter a summary judgment against plaintiff on its

allegations of fraud and conspiracy; and that to that extent, the

allegations in Count II were undetermined by the summary judgment

and the moving defendants should answer those charges. April 18th

the trial court entered summary judgments as prayed. It ordered

Bannenberg, Calagano, Collins, Berlinger and Hoffman to answer Count I

of the second amended complaint.

Plaintiff contends that this action does not fail within

the classes of actions in the summary judgments Act and that the

court was, therefore, without jurisdiction to enter any of the

judgments. It agrees with defendants that plaintiff waived this

point as to the summary judgment in favor of McKinley, Price and

Bannan by filing counter-affidavits to those filed by them under

their motion. It is true that plaintiff later objected on the same ground to the entry of summary judgments in favor of the other defendants. The objection would not hold in any event against Continental Casualty Company, since plaintiff's action against it was upon a contract and clearly within the Summary Judgment Act.

The case in Count II rested upon the illegality of the payments of the fees. The summary judgment in favor of McKinley, Price and Dennen decided this issue against plaintiff. The charge of conspiracy fell with the determination that the payments were lawful. The question of fraud was settled. Assuming, without deciding, that plaintiff attempted to state a tort action in Count II, the normal procedure would have been for the remaining defendants therein to set up the summary judgment in bar of plaintiff's action against them. This procedure would present the same question of law, however, as was presented by the motions actually made by the defendants. If the affidavits, therefore, under the motion of McKinley, Price and Dennen justified the summary judgment, we see no harm to plaintiff in the procedure followed in the trial court.

If the pleadings and affidavits presented no triable issues of fact as to McKinley, Price and Dennen, the summary judgment in their favor was correct. The plaintiff alleged in substance that there was no authority for McKinley and Dennen to serve, no services rendered by them, no bills submitted to the Council for any services and no obligation therefor and no authority to issue the vouchers for services. McKinley and Dennen in their answer and affidavit met this claim by setting forth the resolution of the Village Council employing them, a recital of the services rendered by them, copies of the bills submitted by them and receipt and approval of these bills by the Council. Plaintiff's first counter-affidavit simply

their motion. It is true that plaintiff later objected on the same ground to the entry of summary judgment in favor of the other defendants. The objection would not hold in any event against Continental Casualty Company, since plaintiff's action against it was upon a contract and clearly within the Summary Judgment Act.

The court in Count II rested upon the illegality of the payments of the fees. The summary judgment in favor of McKinley, Price and Dennen decided this issue against plaintiff. The charge of conspiracy fell with the determination that the payments were lawful. The question of fraud was settled. Assuming, without deciding, that plaintiff attempted to state a tort action in

Count II, the normal procedure would have been for the remaining defendants therein to set up the summary judgment in bar of plaintiff's action against them. This procedure would present the same question of law, however, as was presented by the motions actually made by the defendants. If the affidavits, therefore, under the motion of McKinley, Price and Dennen justified the summary judgment, we see no harm to plaintiff in the procedure followed in the trial court.

If the affidavits presented no triable issues of fact as to McKinley, Price and Dennen, the summary judgment in their favor was correct. The plaintiff alleged in substance that there was no authority for McKinley and Dennen to serve, no services rendered by them, no bills submitted to the Council for any services and no obligation therefor and no authority to issue the vouchers for services. McKinley and Dennen in their answer and affidavits met this claim by setting forth the resolution of the Village Council employing them, a recital of the services rendered by them, copies of the bills submitted by them and receipt and approval of those bills by the Council. Plaintiff's first counter-affidavit simply

charged that Price was a member of the law partnership with McKinley and Dennen and, on information and belief, that Price's fees as Village Attorney were shared with his partners. The second affidavit set forth again the Village Attorney ordinance. This expressly authorizes employment as Special Counsel of partners of the Village Attorney. The counter-affidavits made no issue on the matters stated in the affidavits. They appear to rely upon the statement that McKinley and Dennen did not render services such as are described in the Village Attorney ordinance. There is no denial that McKinley and Dennen were regularly employed by the Village Council to render extensive services in connection with the bond issues and submitted their bills which were duly approved and ordered paid. Under these circumstances we believe that the summary judgment is proper.

Plaintiff finally contends that there was no appropriation in the Village Annual Appropriation ordinances to govern the fees for which the vouchers were issued. Defendants say, and we agree, that this is no objection to the legality of the payments. Simpson v. City of Highwood, 372 Ill. 212. Plaintiff further contends that the payment of the fees was, in effect, an increase during his term of office of the Village Attorney and, therefore, illegal under the Constitution. Plaintiff does not deny that the Village Attorney held his office at the pleasure of the Village Council. Accordingly, we decide that he was not such an officer as came within the constitutional provision. Morgan v. County of DuPage, 371 Ill. 53.

For the reasons given the judgments are affirmed.

JUDGMENTS AFFIRMED.

LEWE AND BURKE, JJ. CONCUR

charged that Price was a member of the law partnership with McKinley and Dennen and, on information and belief, that Price's fees as Village Attorney were shared with his partners. The second affidavit set forth again the Village Attorney ordinance. This expressly authorizes employment as Special Counsel of partners of the Village Attorney. The counter-affidavits made no issue on the matters stated in the affidavits. They appear to rely upon the statement that McKinley and Dennen did not render services such as are described in the Village Attorney ordinance. There is no denial that McKinley and Dennen were regularly employed by the Village Council to render extensive services in connection with the bond issues and submitted their bills which were duly approved and ordered paid. Under these circumstances we believe that the summary judgment is proper.

Plaintiff finally contends that there was no appropriation in the Village Annual Appropriation ordinances to govern the fees for which the vouchers were issued. Defendants say, and we agree, that this is no objection to the legality of the payments. Simpson v. City of Chicago, 375 Ill. 218. Plaintiff further contends that the payment of the fees was, in effect, an increase during his term of office of the Village Attorney and, therefore, illegal under the Constitution. Plaintiff does not deny that the Village Attorney held his office at the pleasure of the Village Council. Accordingly, we decide that he was not such an officer as came within the constitutional provision. Morgan v. County of Dubuque, 271 Ill. 83.

For the reasons given the judgments are affirmed.

JUDGMENTS AFFIRMED.

LEWIS AND CLARK, JJ. CONCUR.

43551

LILLIAN RANZ,

Appellee and Cross-Appellant,

v.

COL W. W. YASCHENKO and 181 EAST LAKE SHORE
DRIVE HOTEL CORPORATION, a corp.,

Appellants,

COL. W. W. YASCHENKO,

Cross-Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

329 I.A. 274

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a dramshop action to recover damages for injuries plaintiff suffered as a result of an accident in the Yar Restaurant in Chicago, March 6, 1942. Judgment on the verdict was entered May 4, 1945 in favor of plaintiff in the amount of \$15,000. Defendants have appealed. Plaintiff filed a cross appeal.

The original complaint was filed August 17, 1942 against Yaschenko, owner and operator of the Yar, charging negligent maintenance of a stairway. An amended complaint joined the Hotel Corporation, Yaschenko's lessor, as defendant. A charge of lack of proper lighting was the only substantial change in the pleadings. The second amended complaint was filed September 2, 1943. Count I added the charge of a violation of a City stairway ordinance to charges in the preceding complaints. Count II alleged liability under the Dram Shop Act. Trial was had upon this second amended complaint in April 1944. The trial court directed a verdict for defendants on Count I at the close of plaintiff's case. Count II was submitted to the jury which returned a verdict for \$25,000 in plaintiff's favor.

ALBANY

ALBANY COUNTY

Defendant and Cross-Defendant,

v.

JOHN W. YASCHENKO and JAMES EARL YASCHENKO,
Plaintiffs, a Corp.,

Defendants,

JOHN W. YASCHENKO,

JOHN W. YASCHENKO,

Cross-Defendant.

322 I.A. 284

This is a damages action to recover damages for injuries plaintiff suffered as a result of an accident in the Yer restaurant in Chicago, March 6, 1943. Judgment on the verdict was entered May 4, 1945 in favor of plaintiff in the amount of \$1,000. Defendants have appealed. Plaintiff filed a cross appeal. The original complaint was filed August 17, 1944 against Yaschenko, owner and operator of the Yer, charging negligent maintenance of a stairway. An amended complaint joined the defendant, James Earl Yaschenko, as defendant. A charge of lack of proper lighting was the only substantial change in the pleadings. The second amended complaint was filed September 2, 1945. Count 1 added the charge of a violation of a City stairway ordinance to charges in the preceding complaint. Count 2 alleged liability under the Fire Code. Trial was had upon this second amended complaint in April 1946. The trial court directed a verdict for defendants on Count 1 at the close of plaintiff's case. Count 2 was submitted to the jury which returned a verdict for \$25,000 in plaintiff's favor.

Plaintiff duly filed notice of appeal from the judgment for defendants on Count I. The appeal was dismissed for want of prosecution in the trial court. The court ordered a new trial as to Count II on the grounds that plaintiff's counsel made prejudicial argument which inflamed the minds of the jury resulting in an excessive verdict which could not be cured by remittitur. Plaintiff sought leave from this court to appeal from that order. Leave was denied, No. 43181.

The instant appeal is from the judgment entered after the retrial of the issues in Count II. Plaintiff has filed a cross-appeal from the judgment entered in April 1944 on Count I. Defendants made a motion here to dismiss the cross-appeal. The motion was taken with the case.

Defendants argue that the judgment on Count I became final when the trial court denied plaintiff's motion thereon June 9, 1944; that plaintiff perfected her appeal within 90 days but abandoned it; and that she cannot re-appeal more than a year after the judgment became final. Plaintiff says her first appeal was premature under the ruling in Phillips v. O'Connell, 322 Ill. App. 164 and 326 Ill. App. 15, and that her right to appeal did not accrue until all the issues between the parties on both counts had been disposed of by the judgment upon the verdict in the second trial upon Count II. Here the judgment on Count I was a definitive disposition of the issues in the negligence case. The issues in that case in no wise affect the issues in Count II. The judgment on Count I was final and appealable and the Phillips cases, therefore, not applicable. The cross appeal is, accordingly, dismissed. We shall consider Count I out of the appeal and confine our review to the second trial of the Dram Shop action in Count II.

Plaintiff only filed notice of appeal from the judgment for defendant on Count I. The court was dismissed for want of prosecution in the trial court. The court ordered a new trial as to Count II in the grounds that plaintiff's counsel made prejudicial argument which inflamed the minds of the jury resulting in an erroneous verdict which could not be cured by reversion. Plaintiff sought leave from this court to withdraw from that order. Leave was denied, No. 43781.

The instant appeal is from the judgment entered after the reversal of the issues in Count II. Plaintiff has filed a cross-appeal from the judgment entered in April 1944 on Count I. Defendants made a motion here to dismiss the cross-appeal. The motion was taken with the case.

Defendants argue that the judgment on Count I became final when the trial court denied plaintiff's motion between June 9, 1944; that plaintiff perfected her appeal within 60 days but abandoned it; and that she cannot re-open more than a year after the judgment became final. Plaintiff says her first appeal was premature under the ruling in Smith v. O'Connell, 382 Ill. App. 164 and 326 Ill. App. 15, and that her right to appeal did not accrue until all the issues between the parties on both counts had been disposed of by the judgment upon the verdict in the second trial upon Count II. Here the judgment on Count I was a definitive disposition of the issues in the negligence case. The issues in that case in no wise affect the issues in Count II. The judgment on Count I was final and resolvable was the Smith case, therefore, not applicable. The cross appeal is, accordingly, dismissed. We shall consider Count I out of the case and confine our review to the second trial of the case upon action in Count II.

On the day of the accident plaintiff, pursuant to a phone call from her roommate Ann Stewart, arrived at Eitel's Restaurant in the Field Building at about 6 P.M. She spent about 20 minutes in the company of Miss Stewart, Mr. Teter and Mr. Phillips. She drank part of a "whisky and plain water" before the four of them left for the Palmer House to attend a Cocktail Party given by Mr. Loveland. At this party appetizers and drinks were served in Loveland's suite. Plaintiff neither ate nor drank. There were ten people in attendance at this party, including Mrs. Kelliher. Plaintiff had not met her or several others before. Plaintiff spent about an hour at this party. Mrs. Kelliher showed some effect of the drinks she had had, being according to the testimony, "a little gay", a "little noisy" and "rather loud."

When the party had been about an hour at the Palmer House, Teter invited Loveland's party to join his for dinner. The Yar Restaurant was suggested. Plaintiff, Miss Stewart, Teter and Phillips went in one cab. The others followed. At the Yar they spent about a half hour at the bar until their dinner was ready. Drinks were served at the bar. Plaintiff drank another whisky and plain water. A second one served her was drunk by Mrs. Kelliher who had become intoxicated and noisy and staggered when she walked.

When dinner was announced the party proceeded from the bar down several steps into the lobby of the Hotel and across the lobby and up seven steps into the dining room. Their dinner was served at a table about 40 feet from the stairway. Plaintiff and Teter danced until the food was served and then returned to the table. Plaintiff then asked Miss Stewart to accompany her to the powder room. Miss Stewart did not go with her, but Mrs. Kelliher did. It was during this journey that plaintiff was injured.

On the day of the accident plaintiff, pursuant to a phone call from her roommate and tenant, arrived at plaintiff's apartment in the field building at about 8 P.M. The tenant about 10 minutes in the company of Miss Stewart, Mr. Lewis and Mr. Phillips. The drunk part of a whiskey and plain water before the tour of the then left for the other rooms to attend a cocktail party given by Mr. Loveland. At this party conversations and drinks were served in Loveland's suite. Plaintiff delivered the bar drink. There were ten people in attendance at this party, including Mr. Callahan. Plaintiff had not met her or several others before. Plaintiff went about an hour or this party. Mr. Callahan showed some effect of the drink the last day, being according to the testimony, "a little gay," "a little noisy" and "rather loud."

When the party was over about an hour of the last house, Peter invited Loveland's party to join his for dinner. The bar restaurant was suggested. Plaintiff, Miss Stewart, Peter and Phillips went in the car. The others followed. At the bar they spent about a half hour at the bar until their dinner was ready. Drinks were served at the bar. Plaintiff drank another whiskey and plain water. A second one was given by Mr. Callahan who had become intoxicated and noisy and staggered when she walked. When dinner was announced the party proceeded from the bar down several steps into the lobby of the hotel and around the lobby and up seven steps into the dining room. Their dinner was served at a table about 40 feet from the hallway. Plaintiff and Peter danced until the food was served and then returned to the table. Plaintiff then asked Miss Stewart to accompany her to the powder room. Miss Stewart did not go with her, but Mr. Callahan did. It was during this journey that plaintiff was injured.

The issue of fact is whether plaintiff was injured as a result of being pushed by the intoxicated Mrs. Kelliher, or as the result of slipping and falling on the stairs. Plaintiff alleged that Yaschenko sold liquor to Mrs. Kelliher contributing to her intoxication.

Defendant contends that the finding that plaintiff was injured as a result of being pushed by Mrs. Kelliher should be set aside as a matter of law or, in any event, as against the manifest weight of the evidence. There is evidence that drinks served to Mrs. Kelliher at the Yar contributed to her intoxication; that plaintiff followed by Mrs. Kelliher walked toward the stairway; and that when a foot or so from the top of the stairway, plaintiff looked back to see whether Miss Stewart was coming, and that Mrs. Kelliher pushed her causing her to fall to the bottom of the stairs and suffer the injury. We think this evidence was sufficient to take the case to the jury.

The first two complaints were introduced in evidence. They made no mention of a case under the Dram Shop Act. Defendant seizes upon this omission to contend that Count II in the Second Amended Complaint was an afterthought. Plaintiff testified that she told her first attorney "the facts" of her injury over the telephone but did not talk with him personally for more than a month or more after the complaint was filed, and then told him just how the accident happened; and that she did not tell him the facts alleged in her first and second complaints and signed none of the complaints and had not seen any of them. The attorney did not testify. Plaintiff further testified that in the summer of 1943 she went back to the Yar with her present attorney to show him where the accident happened. Her second amended complaint was

The issue of fact is whether plaintiff was injured as a result of being pushed by the intoxicated Mrs. Kellner, or as the result of slipping and falling on the stairs. Plaintiff alleged that Yatschenko said in her testimony to Mrs. Kellner contributing to her information.

Defendant contends that the finding that plaintiff was injured as a result of being pushed by Mrs. Kellner should be set aside as a matter of law or, in any event, as against the weight of the evidence. There is evidence that drinks served to Mrs. Kellner at the bar contributed to her intoxication; that plaintiff followed by Mrs. Kellner walked toward the stairs; and that when a foot or so from the top of the stairway, plaintiff looked back to see whether Mrs. Kellner was coming, and that Mrs. Kellner caused her causing her to fall to the bottom of the stairs and suffer the injury. In this evidence was sufficient to take the case to the jury.

The first two complaints were introduced in evidence. They were no mention of a case under the law shop of. Defendant set out this case to contend that Count II in the second amended complaint was an afterthought. Plaintiff testified that she told her first attorney "the facts" of her injury over the telephone but did not tell him personally for more than a month or more after the complaint was filed, and then told him just how the accident happened; and that she did not tell him the facts alleged in her first and second complaints and signed none of the complaints and had not seen any of them. The attorney did not testify. Plaintiff further testified that in the summer of 1943 she went back to the bar with her present attorney to show him where the accident happened. Her second amended complaint was

filed thereafter in September 1943. The jury may have believed that plaintiff in nowise controlled her first attorney in the allegations of the first and second complaints. It was the function of the jury to draw the inferences from the omission.

Defendants contend furthermore, that in the hospital records covering plaintiff's injuries, there is no mention that plaintiff was pushed. The records state that plaintiff "fell" down a flight of steps, and "fell" with her right leg under her. We think the jury could rightfully believe that such records would not normally contain the details of plaintiff's fall. The term "fell" moreover does not preclude the idea of having been pushed. Defendants refer us to a letter written by Miss Stewart to Mrs. Kelliher in January, 1942. This letter asks Mrs. Kelliher to write to Miss Stewart what the former remembered of the accident. In the first paragraph, by way of refreshing Mrs. Kelliher's memory, Miss Stewart referred to the dinner party of March 6th when plaintiff "fell and hurt her ankle." We think the jury might well consider this a prudent way to approach Mrs. Kelliher and that the objective could be better reached by using the term "fell" and letting Mrs. Kelliher fill in the details, than by risking her resentment at being charged with pushing plaintiff.

The only other testimony in addition to plaintiff's bearing on plaintiff's ^{side of the} factual issue was that of Miss Stewart. She testified in a deposition that after Mrs. Kelliher and plaintiff left the table, the former came "running back" in 15 or 20 seconds and said that plaintiff had fallen. Miss Stewart testified, "I immediately got up and started around the table. I said, 'What happened?' She said, 'I bumped her and she fell.' " This testimony was admitted over the objections of the defendants. They complain

filed thereafter in September 1962. The jury may have believed that plaintiff in her case controlled her first attorney in the allegations of the first and second complaints. It was the intention of the jury to draw the inference from the evidence.

Defendant's counsel furthermore, that in the hospital records covering plaintiff's injuries, there is no mention that plaintiff was pushed. The records state that plaintiff "fell" down a flight of steps, and "fell" with her right leg under her. We think the jury could reasonably believe that such records would not normally contain the details of plaintiff's fall. The court "fell" moreover does not preclude the idea of having been pushed. Defendant's reply as to a letter written by the doctor to Dr. Kellner in January, 1962. This letter asks Dr. Kellner to write to the doctor what the doctor remembered of the accident. In the first paragraph, by way of retelling Dr. Kellner's memory, the doctor referred to the dinner party of March 28th when plaintiff "fell and hurt her ankle." We think the jury might well consider this a prudent way to describe Dr. Kellner and that the objective would be better reached by using the word "fell" and letting Dr. Kellner fill in the details, than by asking her to recant at being charged with pushing plaintiff.

The only other testimony in relation to plaintiff's being on plaintiff's "left hand" was that of Miss Stewart. She testified in a deposition with other Dr. Kellner and plaintiff that the fall, the doctor said "troubling back" in it or to stomach and said that plaintiff had fallen. Miss Stewart testified, "I instinctively got up and started around the table. I said, 'hat happened?' She said, 'I bumped her and she fell.'" This testimony was admitted over the objection of the defendant. They complain

here that this testimony was not part of the res gestae, was inadmissible and highly prejudicial. To sustain their contention they rely on Chicago West Division Ry. Co. v. Becker, 128 Ill. 545; and Boyd v. West Chicago St. R. R. Co., 112 Ill. App. 60. In these cases the disputed statements were the only evidence of the essential fact. They are not helpful except in a general statement of law upon the subject. Plaintiff refers us to Morris v. Central West Casualty Co., 351 Ill. 40. The factual question there was whether the injury resulted from an accident. It is helpful only in the way that defendants cases are. Plaintiff also refers us to Peterson v. Cochran & McCluer Co., 308 Ill. App. 348. The facts in that case differ from the ones before us and this court held that the statement under the circumstances was properly excluded. This court there pointed out, however, that spontaneity was the important consideration, that the trial court should have reasonable latitude and referred to Prof. Wigmore's advocacy of absolute control by the trial court. We believe that the Illinois cases generally conform to the principles of the res gestae rule announced in 32 Corpus Juris Secundum at pages 30, 31, 36, 37, 38 and 39. We think a trial court's determination of the admissibility of the evidence should depend upon the question of spontaneity and whether the circumstances clearly exclude the idea of premeditation. Under the circumstances of this case we think the trial court's ruling was correct. For a full statement of the principles of the res gestae doctrine we refer to Leckliedner v. Chicago City Railway Co., 142 Ill. App. 139 and the reporter's note following the opinion; Fowler v. C. & W. I. R. Co., et al., 182 Ill. App. 123; and Lips v. Chicago City Railway, 209 Ill. App. 332. We do not believe that the statement was inadmissible under the locus in quo rule announced in Johnson v. Swords Co., 286 Ill. App. 377.

here that this testimony was not part of the case, was inadmissible and his prejudice. It is certain in its content that they rely on Chicago v. City of Chicago, 188 Ill. 545; and Chicago v. City of Chicago, 188 Ill. 545; and Chicago v. City of Chicago, 188 Ill. 545. In these cases the disinterested witnesses were the only evidence of the essential fact. They are not helpful except in a general statement of law upon the subject. Plaintiff refers to Chicago v. City of Chicago, 188 Ill. 545. The factual question there was whether the injury resulted from an accident. It is helpful only in the way that defendant's case is. Plaintiff also refers to Chicago v. City of Chicago, 188 Ill. 545. The facts in that case differ from the ones before us and this court held that the defendant under the circumstances was properly excluded. This court there pointed out, however, that spontaneity was the important consideration that the trial court should have reasonable latitude and referred to that court's necessity of absolute control by the trial court. We believe that the Illinois cases generally conform to the principles of the rule announced in Chicago v. City of Chicago, 188 Ill. 545. 30, 31, 32, 33 and 34. We think a trial court's determination of the admissibility of the evidence should depend upon the question of spontaneity and whether the circumstances clearly exclude the idea of premeditation. Under the circumstances of this case we think the trial court's ruling was correct. For a full statement of the principles of the rule we refer to Chicago v. City of Chicago, 188 Ill. 545. 35, 36, 37, 38 and 39. The reporter's note following the citation; Chicago v. City of Chicago, 188 Ill. 545, 183; and Chicago v. City of Chicago, 188 Ill. 545, 183. We do not believe that the statement was inadmissible under the facts in the rule announced in Chicago v. City of Chicago, 188 Ill. 545, 183.

The Yar cashier and check room girl who, at the time of the trial, had worked 9 and 4 years respectively for Yaschenko, contradicted plaintiff's story. They testified that plaintiff was unaccompanied when she fell and that she "stumbled" or "twisted her ankle" on the second or third stair and fell. Plaintiff's counsel on cross-examination was permitted to elicit the information from both these witnesses that, although they were present during the two or three days of the previous trial, they had not testified. The court sustained defendants' objection which sought to develop at whose request they were in attendance at the first trial. Complaint is made that the cross-examination of these witnesses with reference to their failure to testify at the first trial served no purpose but to prejudice the jury. Defendants say that the failure of these witnesses to testify at the previous trial had no bearing on their credibility since they had no control over their being called.

No case is cited on this point. The two cases which we have found on the subject would seem to lend support to defendants' position. They are Spring v. Perkins, 120 N. W. 807; and Brock v. State, 26 Ala. 104. The holdings appear to be based on the proposition that it would not be fair to the witness to draw inferences affecting their credibility, since as defendant contends, their testifying was not under their control.

In the case before us the two witnesses were employees of Yaschenko at the time of the accident and at the time of both trials. They were the only witnesses so far as the record shows who could refute plaintiff's testimony. One of them says that she gave a written statement to defendants' auditor the night of the accident. The other says that she told no one of having seen the accident until, before the first trial, almost two years later. We assume that the defendant must have known that these two witnesses saw the accident, if they told the truth at the trial. It does not seem probable that if defendant had known he would not have called them

the Yerkes and Brock room which was, at the time of the trial, had worked 8 and 9 years respectively for Yachnick, contradicted Plaintiff's story. They testified that Plaintiff was unconscious when she fell and that she "slumped" or "twisted her ankles" on the floor or stairs and fell. Plaintiff's counsel on cross-examination was permitted to elicit the information from both these witnesses that, although they were present during the two or three days of the previous trial, they had not testified. The court sustained defendants' objection which was not to develop at those request they were in attendance at the first trial. Defendant made that the cross-examination of these witnesses with reference to their failure to testify at the first trial served no purpose but to prejudice the jury. Defendants say that the failure of these witnesses to testify at the previous trial had no bearing on their credibility since they had no control over their being called. No case is cited on this point. The two cases which we have found on the subject would seem to lend support to defendants' position. They are Wright v. Perkins, 120 N. W. 2d 807; and Brock v. State, 26 Ala. 104. The holding seems to be based on the proposition that it would not be fair to the witness to draw inferences affecting their credibility, since as defendant contends, their testimony was not under their control.

In the case before us the two witnesses were employed of Yachnick at the time of the accident and at the time of both trials. They were the only witnesses so far as the record shows who could refute Plaintiff's testimony. One of them says that she gave written statement to defendant's lawyer the night of the accident. The other says that she did not have any conversation with the defendant until, before the first trial, about two years later. We assume that the defendant must have known that these two witnesses saw the accident, if they told the truth at the trial. It does not seem probable that if defendant had known he would not have called them

as witnesses at the first trial. We think their failure to testify at the first trial had a bearing on the credibility of the witnesses in the instant case. We do not believe that plaintiff should be deprived of this factor as against the defendant simply because it might reflect on the credibility of the witnesses. It is our view that the court did not commit error in permitting their cross examination.

Defendants contend that plaintiff was not an innocent person entitled to recovery under the Dram Shop Act. The evidence shows that plaintiff drank part of one drink and one other drink, and these about two hours apart. They say that plaintiff made no objection to Mrs. Kelliher being included in the party at the Yar. Since it was not her party, the jury may have thought she was not in a position to do so. There was testimony that Mrs. Kelliher was loud, staggering and annoying at the bar in plaintiff's presence. Plaintiff may have considered that prudence directed that she should do nothing more than she did about Mrs. Kelliher's annoying conduct. The jury may have believed that it would have been poor taste for plaintiff to have acted otherwise than she did throughout the period of the party. While everyone might not agree with the jury that plaintiff was prudent in walking toward the powder room accompanied by Mrs. Kelliher, we cannot say as a matter of law that this conduct precludes her under the Act. We think that none of the cases cited are inconsistent with this conclusion. We think this matter was for the jury and we cannot say that it was not justified in finding that plaintiff was an innocent party.

Defendants contend that prejudicial error was committed in plaintiff's counsel's arguments to the jury. We see no merit in any complaint about the argument except with respect to discussing the failure of the cashier and check girl to testify at the previous trial. Plaintiff's counsel asked in opening why ^{the} witnesses did not

an witnesses at the first trial. We think that failure to testify at the first trial had a bearing on the credibility of the witnesses in the instant case. We do not believe that plaintiff should be deprived of this factor in making the balance fairly between it might reflect on the credibility of the witnesses. It is our view that the court did not commit error in permitting their cross examination.

Defendants contend that plaintiff was not an innocent person entitled to recovery under the Green Act. The evidence shows that plaintiff drank part of one drink and one other drink, and there about two hours apart. They say that plaintiff made no objection to Mrs. Kelliner being included in the party at the Y. Since it was her party, the jury may have thought she was not in a position to do so. There was testimony that Mrs. Kelliner was loud, chattering and annoying at the bar in plaintiff's presence.

Plaintiff may have considered that evidence directed that she should do nothing more than she did about Mrs. Kelliner's annoying conduct. The jury may have believed that it would have been poor taste for plaintiff to have acted otherwise than she did throughout the portion of the party. While everyone might not agree with the jury that plaintiff was prudent in walking toward the powder room accompanied by Mrs. Kelliner, we cannot say as a matter of law that this conduct precluded her under the Act. We think that none of the cases cited are inconsistent with this conclusion. We think this matter was for the jury and we cannot say that it was not justified in finding that plaintiff was an innocent party.

Defendants contend that prejudicial error was committed in plaintiff's counsel's arguments to the jury. We see no merit in any complaint about the argument except with respect to discussing the failure of the counsel and object first to testify at the previous trial. Plaintiff's counsel asked in opening why witnesses did not

testify at the earlier trial. He challenged his opponent to answer why, since they were available, they did not testify. He suggested it may have been that they were not telling "that story" then, or that the lawyers did not believe their story. Defendants' counsel responded that the witnesses stood in the corridor for 4 or 5 days at the last trial and were not called because he did not think "we needed them, and we didn't need them". He said an attorney exercises his judgment in conducting a case and said the incident was no reason to disbelieve the witnesses. Plaintiff's counsel answered that, "They did not need them last year and, if they did not need them, why did they put them on now?" He then said that his opponent had no right to withhold evidence; that if he withheld it before, it is fair to imply that "he might be withholding it now;" that "this year he needs it"; and "we stood on the truth and that was enough for us then" and "It is enough for us again just as it was last year. Is it good enough for them?"

Since no error was committed in permitting the cross-examination already referred to, we must consider the claim of prejudicial argument in that light. Counsel are entitled to draw inferences in their argument where a party fails to produce witnesses who may fairly be said to be under his control and who would contribute to the administration of justice by their testimony. McNeff v. White Eagle Brewing Co., 294 Ill. App. 37; Chicago Daily News v. Kohler, 360 Ill. 351. In Springfield Consolidated Railway v. Bell, 134 Ill. App. 426; and Chapman v. City Railway Co., 172 Ill. App. 443, judgments were reversed because attorneys argued to the jury with respect to a previous trial of the case. In these cases, however, the error was not in the references to the former trials but in suggesting or telling the jury the results of the earlier trials.

testify at the earlier trial. He challenged his opponent to answer
 way, since they were available, they did not testify. He suggested
 it may have been that they were not telling "that story" then, or that
 the lawyers did not believe their story. Defendant's counsel
 responded that the witnesses stood in the courtroom for 4 or 5 days
 at the last trial and were not called because he did not think "we
 needed them, and we didn't need them". He said an attorney experienced

his judgment in conducting a case and said the incident was no
 reason to disbelieve the witnesses. Plaintiff's counsel answered
 that, "They did not need them last year and, if they did not need
 them, why did they put them on now?" He then said that his opponent
 had no right to withhold evidence; that if he withheld it before,
 it is fair to imply that "he might be withholding it now;" that
 "this year he needs it"; and "we stood on the train and that was
 enough for us then" and "it is enough for us again just as it was
 last year. Is it good enough for them?"

Since an error was committed in permitting the cross-

examination already referred to, we must consider the claim of
 prejudicial argument in this regard. Counsel are entitled to draw
 inferences in their argument where a party fails to produce witnesses
 who may fairly be said to be under his control and who would contribute
 to the administration of justice by their testimony. Howell v.

White Lake Trading Co., 284 Ill. App. 371; Chicago Dairy Sales v. Bell,
Exhler, 380 Ill. 601. In People v. Consolidated Railway v. Bell,
134 Ill. App. 443; and Chicago v. City of Chicago, 172 Ill. App. 443,
 judgments were reversed because attorneys argued to the jury with
 respect to a previous trial of the case. In these cases, however,
 the error was not in the evidence to the jury but in
 suggesting or telling the jury the results of the earlier trials.

In the argument of the counsel for the defendants he said he did not use the witnesses last year because "we didn't think we needed them, and we didn't need them". This could tend to mislead the jury into believing that defendants had prevailed. We think this statement invited whatever counsel for plaintiff said in responding. Furthermore, it appears to us that, read as a whole, the argument of plaintiff's counsel did not suggest the result of the first trial. We think it is quite plain that the jury, as we, would infer that plaintiff's counsel was referring to the failure of the witnesses to be called when he spoke of the truth being good enough for plaintiff in that trial and asking was it good enough for the defendants then and at the present trial. In view of what we have said about the examination of the two witnesses, we see nothing unfair about this argument.

The defendant states, but does not argue, that the damages were excessive. In view of the fact that medical testimony connected a second injury suffered by plaintiff with the first, we see no merit in this statement.

The judgment of the Superior Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

LEWE AND BURKE, JJ. CONCUR.

in the argument of the counsel for the defendant he said he did not use the witness last year because "we didn't think we needed him, and we didn't need him". This would tend to disprove the jury into

believing that defendant had provided. We think this statement invited whatever counsel for plaintiff said in responding. Further-
more, it appears to me that, read as a whole, the argument of plain-
tiff's counsel did not suggest the result of the first trial.

Think it is quite plain that the jury, as we would infer that
plaintiff's counsel was not trying to the jurors of the witnesses
to be called when he spoke of the truth being good enough for plain-
tiff in that trial and asking was it good enough for the defendant
then and at the present trial. In view of what we have said about
the situation of the two witnesses, we see nothing unfair about
this argument.

The defendant stated, but does not argue, that the
damages were speculative. In view of the fact that medical testimony
connected a second injury suffered by plaintiff with the first,
we see no merit in this statement.
The judgment of the superior court is, therefore, affirmed.

JUDGMENT AFFIRMED.

LEWIS AND CLARK, JJ. CONCUR.

43560

ERIC BOCK,

Appellee,

v.

FELIX JABLONSKI, et al.,

Defendants,

On Appeal of FELIX JABLONSKI,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

329 I.A. 275¹

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for the specific performance of an alleged oral agreement with respect to oil properties in Wayne County, Illinois. April 2, 1945 a decree was entered in plaintiff's favor after an ex parte hearing. June 28, 1945, defendant Jablonski filed a notice of appeal from that decree. August 7, 1945 Jablonski filed a "supplemental notice of appeal" from an order entered the preceding day denying the prayer of his petition filed June 18th to vacate the decree of April 2nd.

Jablonski mainly contends that plaintiff neither alleged nor proved a case of specific performance.

The complaint in substance charges that Jablonski and Schulte were owners of certain leases of land in Wayne County, Illinois; that pursuant to their agreement to pool their leases, Jablonski, on behalf of the partnership, employed plaintiff to find an investor of \$12,000 to finance drilling of the wells; that Jablonski agreed to give plaintiff 2/32 of all the oil produced from "up to thirteen wells" on the acreage; that plaintiff produced the investor ready, willing and able and the defendants dealt in violation of their agreement with another investor; and that plaintiff demanded but was refused his 2/32 share of the oil produced.

4120

THIS BOOK

Page

v.

WILLIAM J. JACOBSON, et al.

Defendants

On Appeal of WILLIAM JACOBSON

Plaintiff

DEPT. OF

CIRCUIT COURT

COOK COUNTY

40

3891.A.252

RE. WILLIAM JACOBSON et al. vs. WILLIAM J. JACOBSON, et al.

This is an action for the specific performance of an

alleged oral agreement with respect to all properties in Wayne

County, Illinois. April 1, 1945 a decree was entered in plain-

tilt's favor after an ex parte hearing. June 22, 1945, defendant

Jacobson filed a notice of appeal from that decree. August

7, 1945 Jacobson filed a "supplemental notice of appeal" from

an order entered the preceding day denying the prayer of his

petition filed June 15th to vacate the decree of April 1st.

Jacobson's motion was denied. Plaintiff's motion was granted.

Plaintiff has proved a case of specific performance.

The complaint in substance charges that Jacobson and

defendants were owners of certain tracts of land in Wayne County,

Illinois; that pursuant to their agreement to pool their lands,

Jacobson, on behalf of the partnership, employed plaintiff to

find an investor of \$10,000 to finance drilling of new wells;

that Jacobson agreed to give plaintiff 2 1/2% of all the oil produced

from "as to be drilled wells" on the property; that plaintiff produced

the investor money, drilling new wells and the defendant dealt in

violation of their agreement with another investor; and that plain-

tilt demanded and was refused his 1/8% share of the oil produced.

It is fundamental that plaintiff to prevail in this specific performance suit must prove the elements of a contract by clear and convincing proof. The complaint charging the copartnership in the leases and in the contract with plaintiff was amended after evidence taken, changing the theory from a partnership to Jablonski, individually. Plaintiff was required to prove, therefore, an agreement by Jablonski to pay him 2/32 of the oil produced from wells, leases to which were owned by Jablonski. This requires proof that Jablonski was lessee of lands containing the wells from which the oil was to be produced.

The complaint sets out descriptions of six parcels "and certain other lands located in the Village of Johnsonville" which plaintiff "is informed and believes" is the copartnership combined acreage. It alleges that Jablonski advised plaintiff that he and Schulte had leases in the Johnsonville district of Wayne county and that plaintiff was promised 2/32 of all the oil produced from two wells on the combined acreage and in eleven more to be drilled on the aforesaid leases.

Jablonski's answer admitted ownership by him and Schulte of certain oil leases in Wayne county, but denied owning any in the Village of Johnsonville and denied that the legal descriptions in the complaint were the correct descriptions of the land, subject of the leases. Plaintiff replied that the leases mentioned in the answer and the complaint were the same and were the subject of the agreement.

Plaintiff was the only witness. He testified that Jablonski called him about "some leases in the Johnsonville pool, in Wayne County" which were being consolidated; that Jablonski told him he was giving plaintiff a chance to find the money for financing of the wells; that plaintiff said he wanted 2/32 of the oil produced

It is fundamental that Plaintiff to prevail in this specific performance suit must prove the elements of a contract by clear and convincing proof. The complaint charging the co-ownership in the leases and in the contract with Plaintiff was amended after evidence taken, changing the theory from a partnership to joint tenancy. Plaintiff was required to prove, therefore, an agreement by Defendant to pay him 2 1/2% of the oil produced from wells, leases to which were owned by Defendant. This requires proof that Defendant was owner of lands containing the wells from which the oil was to be produced.

The complaint sets out description of six parcels "and certain other lands located in the Village of Johnesville" which Plaintiff "is interested and believes" is the co-ownership. Defendant answers. It alleges that Defendant owned of itself that he and Plaintiff had leases in the Johnesville district of Wayne County and that Plaintiff was entitled 2 1/2% of all the oil produced from two wells on the said lands and in eleven more to be drilled on the same lands.

Defendant's answer admitted ownership by him and Plaintiff of certain oil leases in Wayne County, but denied owning any in the Village of Johnesville and denied that the local description in the complaint were the correct descriptions of the land, subject of the leases. Plaintiff replied that the leases mentioned in the answer and the complaint were the same and were the subject of the agreement.

Plaintiff was the only witness. He testified that Defendant called him about "some time in the Johnesville pool, in Wayne County" which were said to be in Johnesville; that Defendant told him he was giving Plaintiff a chance to find the money for financing of the wells; that Plaintiff said he wanted 2 1/2% of the oil produced

from the wells and Jablonski said, "that was all right;" that he, plaintiff, drove his prospect to the Johnsonville pool and then brought him back to Jablonski and that the terms were made between them; that Jablonski never assigned plaintiff the 2/32 part of the oil produced from these leases; that there were "four wells drilled on the leases I have mentioned" and that the wells mentioned were drilled "on some of that acreage" set forth in the complaint. Plaintiff was asked to tell the court "substantially the acreage involved in the leases. He answered that he went to the County Seat of Wayne County and copied the records of assignment by Jablonski and Schulte, and set them forth substantially correct "but there may have been some matter which you know what it is." He identified documents containing his notes and records. These, according to the record, were offered and received as exhibits. The exhibits do not appear in the record or abstract. Plaintiff further testified that he remembered Jablonski's testimony taken in a deposition in April 1942, wherein the witness said that "the leases involved were the Gratton lease, the Shell lease, the Simmons' lease, the Tanney lease and the Smith lease; that 3 wells were drilled on the Gratton lease; and that the total production in April of 1942 was 400 barrels per day.

The pleadings do not define the subject matter of the alleged contract. The decree is no more certain than the pleading and proof. We think it is quite apparent that there is no clear and convincing proof of any ownership by Jablonski of any specific wells, the oil from which plaintiff was to have a share. There is no satisfactory proof of the location of the wells involved in

from the wells and Johnson said, "That was all right;" that he, Plaintiff, drove his property to the Johnsonville pool and then brought his own to Johnsonville and that the same were made between them; that Johnson never saw and Plaintiff the 1/2 part of the oil produced from these leases; that there were "four wells drilled on the lease I have mentioned" and that the wells mentioned were drilled "on some of that acreage" set forth in the complaint. Plaintiff was asked to tell the court "substantially the acreage involved in the lease. He answered that he went to the County Seat of Wayne County and copied the records of assignment by Johnsonville and Plaintiff, and set forth substantially correct "but there may have been some water which you know what it is." He identified documents containing his notes and reports. These, according to the record, were offered and received as exhibits. The exhibits do not appear in the record or exhibit. Plaintiff further testified that he remembered Johnsonville's testimony taken in a deposition in April 1941, wherein the witness said that "the leases involved were the Graham lease, the Wolf lease, the Wilsons' lease, the Henry lease and the Smith lease; that 2 wells were drilled on the Graham lease; and that the total production in April of 1941 was 400 barrels per day. The witnesses do not believe the subject matter of the alleged contract. The 6 acres is no more certain than the alleged and great. He thinks it is more probable that there is no clear and convincing proof of any ownership by Johnsonville of any specific wells, and all from which Plaintiff was to have a share. There is no satisfactory proof of the location of the wells involved in

the alleged contract, nor that any of the wells were located on the property described in the complaint or decree; none that Jablonski owned the land so described and no satisfactory proof that Jablonski owned leases on the land described or otherwise. Several leases are mentioned by name, but no proof as to where they were located and no satisfactory proof of Jablonski's ownership.

We believe that plaintiff has not proved the contract by clear and convincing evidence. We believe that the decree is against the manifest weight of the evidence.

We see no merit in Jablonski's contention that the alleged contract was for a sale of an interest in lands and within the Statute of Frauds. We believe that the alleged contract, according to the testimony, was for the sale of personalty, of the oil after it was produced. The cases cited by defendant in support of this contention are not applicable.

We need not consider the contentions with respect to the question of the propriety of the "supplemental notice of appeal."

For the reasons given the decree of the Circuit Court is reversed and the cause is remanded for retrial.

REVERSED AND REMANDED.

LEWE AND BURKE, JJ. CONCUR.

REVEREND AND HONORABLE,

is reversed and the case is remanded for retrial.

For the reasons given the decree of the Circuit Court

question of the propriety of the "supplemental notice of appeal."

We need not consider the contentions with respect to the

of this contention are not applicable.

all after it was produced. The cases cited by defendant in support

according to the testimony, was for the sale of personally, of the

the statute of France. We believe that the alleged contract,

alleged contract was for a sale of an interest in lands and within

We see no merit in Jolowski's contention that the

against the plaintiff's right of the evidence.

by clear and convincing evidence. We believe that the decree is

We believe that plaintiff has not proved the contract

no satisfactory proof of Jolowski's ownership.

mentioned by name, but no proof as to where they were located and

owned lands on the land described or otherwise. Several leases are

owned the land so described and no satisfactory proof that Jolowski

property described in the complaint or better; none that Jolowski

the alleged contract, nor that any of the wells were located on the

43577

W. C. MAGRUDER,

Plaintiff - Appellant,

v.

JOHN BERNINGER and MARGARET J.
BERNINGER,

Defendants - Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

403
329 I.A. 275²

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

W. C. Magruder, a licensed real estate broker, filed a statement of claim in the Municipal Court of Chicago against John Berninger and Margaret Berninger, his wife, for a commission of \$725 alleged to have been earned in the sale of improved real estate owned by defendants. A trial before the court without a jury resulted in a finding and judgment for the defendants. Plaintiff, appealing, asks that the judgment be reversed and that judgment be entered in his favor for the amount claimed.

Defendants, owners in joint tenancy of the premises at 4121 North Francisco Avenue, Chicago, improved with a two flat brick building and a garage, advertised in the newspapers that the premises were for sale. There were many responses. Plaintiff solicited the listing with his office. On February 23, 1945 his request for a listing was granted, with the understanding that the listing was not "exclusive" and that other brokers were endeavoring to sell the property. The testimony offered by plaintiff was that the listing price was \$14,500, either cash or subject to an existing mortgage, the defendants to pay the customary brokerage commission of 5%. Testimony introduced for defendants was that the listing was at \$14,000 net, and that plaintiff was informed that whatever commission he desired would have to be added by him to the sale price of \$14,000. There was testimony

A

LEGAL FIRM

LEGAL FIRM

ON BEHALF

LEGAL FIRM

Plaintiff - Defendant

v.

JOHN BARNER AND MARGARET BARNER, his wife, for a commission of 75% alleged to have been earned in the sale of improved real estate owned by defendant.

Defendants - Plaintiff

J. C. Barnert, a licensed real estate broker, filed

a statement of claim in the Municipal Court of Chicago against John Barnert and Margaret Barnert, his wife, for a commission of 75% alleged to have been earned in the sale of improved real estate owned by defendant. A trial before the court without a jury resulted in a finding and judgment for the defendant. Plaintiff, appealing, asks that the judgment be reversed and that judgment be entered in his favor for the amount claimed.

Defendants, owners in joint tenancy of the premises at

411 North Francisco Avenue, Chicago, improved with a two flat

brick building and a garage, advertised in the newspapers that

the premises were for sale. There were many responses. Plaintiff

solicited the listing with his office. On February 28, 1945 his

written for a listing was granted, with the understanding that

the listing was not "exclusive" and that other brokers were

endeavoring to sell the property. The testimony offered by

plaintiff was that the listing price was \$14,000, either cash or

subject to an existing mortgage, the defendant to pay the customary

brokerage commission of 5%. Testimony introduced for defendant

was that the listing was at \$14,000 net, and that plaintiff was

informed that whatever commission he desired would have to be

added by him to the net price of \$14,000. There was testimony

on behalf of defendants that the real estate was listed with other agents at \$14,750, the broker's commission to be paid from this amount.

Pursuant to the listing, plaintiff showed the real estate to various prospects. On Saturday, March 10, 1945, plaintiff, accompanied by Mr. and Mrs. George Greve, called at the premises. The Greves were interested in aiding William Vallee to purchase the property, should he be interested. Mrs. Greve is the mother of Mr. Vallee. Mrs. Berninger showed them through the premises and, according to testimony for plaintiff, informed plaintiff that the least price that would be accepted would be \$14,500. There was testimony that on Saturday Mr. and Mrs. Greve told plaintiff that "they" were ready, willing and able to purchase the property, but desired to have Mr. and Mrs. Vallee look at it. On Sunday morning, March 11, 1945, Mr. and Mrs. Vallee, Mrs. Greve and plaintiff went to the premises, talked to Mrs. Berninger and were shown through the premises. There was testimony that before leaving that morning Mr. Vallee asked Mrs. Berninger the price of the property and that she said it was \$14,500. After inspecting the building, Mr. Vallee told plaintiff that he would buy the property. Thereupon plaintiff and Mr. Vallee went to plaintiff's office and plaintiff called Mrs. Berninger on the telephone, advising her that he was working out a deal for her.

At 1:30 that afternoon plaintiff returned to the premises. He testified that he asked Mrs. Berninger if she would take less than \$14,500. She called her husband on the telephone at the place where he was employed and plaintiff and Mr. Berninger had a telephone conversation. There is a conflict in the testimony as to what was said in the conversation. Plaintiff testified that Mr. Berninger said that the least he would take would be \$14,500,

on behalf of defendant that the real estate was listed with
at a price of \$14,500, the broker's commission to be paid
from this amount.

Turned to the list of plaintiffs, Plaintiff showed the real
estate to various persons. On January, March 10, 1944, Plaintiff,
accompanied by Mr. and Mrs. George Grove, called at the premises.
The Groves were interested in buying 11101 1/2 Avenue N. to purchase
the property, should be so interested. Mrs. Grove is the mother
of Mr. Valles. Mrs. Grover stated that through the Groves
and, according to testimony for Plaintiff, informed Plaintiff that
the last price that would be accepted would be \$14,500. There
was testimony that on January 11, 1944, Mr. and Mrs. Grove told Plaintiff
that "they" were ready, willing and able to purchase the property,
but desired to have Mr. and Mrs. Valles look at it. On January
11, 1944, Mr. and Mrs. Valles, Mrs. Grove and chain-
lift went to the premises, talked to Mrs. Grover and were
shown around the premises. There was testimony that before
talking about buying Mr. Valles asked Mrs. Grover the price
of the property and that she said it was \$14,500. After inspecting
the building, Mr. Valles told Plaintiff that he would buy the
property. Thompson Plaintiff and Mr. Valles went to Plaintiff's
office and Plaintiff called Mr. Grover in the telephone,
revealed her that he was willing, out a deal for her.
At 1:30 that afternoon Plaintiff returned to the premises.
He testified that he asked Mrs. Grover if she would take less
than \$14,500. She called her husband on the telephone at the
place where he was employed and Plaintiff and Mr. Grover had
a telephone conversation. There is a conflict in the testimony
as to what was said in this conversation. Plaintiff testified that
Mr. Grover said that the price he would take would be \$14,500.

with a reduction of \$50 should arrangements be made for paying off the mortgage, or for its assumption by the purchaser. Mr. Berninger testified that plaintiff, in the telephone conversation, told him that his prospective buyer was disappointed in the second floor apartment, offered \$14,000 gross, which he, Berninger, declined to accept and that Berninger said that the price was \$14,000 net; also, that if the prospective buyer would take over the mortgage on the premises defendant would "take off \$100." Berninger testified further that the telephone conversation was concluded by a statement from plaintiff that he would talk to his people and let him know the result and that he did not hear from plaintiff again until 8:30 that evening, when plaintiff called him on the telephone and said that he had a contract signed by a prospective buyer and that he had an \$800 deposit, whereupon Mr. Berninger told plaintiff that the premises had been sold that afternoon. Plaintiff testified that in the telephone conversation he told Mr. Berninger that the sale at \$14,500 would be satisfactory, and that he had authority of the purchaser to tell him that "they would take the deal." Plaintiff also testified that he then called Mr. Vallee on defendants' telephone and in the presence of Mrs. Berninger told Mr. Vallee that he was going to get the property at \$14,500, and that if the mortgage "was paid off without any penalty" he would have a \$50 reduction; that Mr. Vallee told him "everything was all right" and to come over and get the deposit and the contract.

Plaintiff testified further that about this time the doorbell rang and a real estate salesman named William Beebe, accompanied by Mr. and Mrs. Clifford Tarr, prospective purchasers, entered the premises. It appears that plaintiff knew that Mrs. Berninger was expecting these people to call. Plaintiff testified that Mrs. Berninger greeted Mr. Beebe and Mr. and Mrs. Tarr at

with a reduction of 50 about 1930, he made for paying off the mortgage, or for its redemption by the purchaser. Mr. Berninger testified that Plaintiff, in the telephone conversation, told him that his prospective buyer was disappointed in the second floor apartment, offered \$14,000 gross, which he, Berninger, declined to accept and that Berninger said that the price was \$14,000 net; also, that if the prospective buyer would take over the mortgage on the premises he would "take off 100." Berninger testified further that the telephone conversation was concluded by a statement from Plaintiff that he would talk to his people and let him know the result and that he did not hear from Plaintiff again until 8:30 that evening, when Plaintiff called him on the telephone and said that he had a contract signed by a prospective buyer and that he had an \$800 deposit, whereupon Mr. Berninger told Plaintiff that the premises had been sold that afternoon. Plaintiff testified that in the telephone conversation he told Mr. Berninger that he was at \$14,200 would be satisfactory, and that he had authority at the time to tell him that "they would take the deal." Plaintiff also testified that he then called Mr. Vallee as defendant's telephone and in the presence of Mr. Berninger told Mr. Vallee that he was going to get the property at \$14,500, and that if the mortgage was paid off without any penalty" he would have a 50 reduction; that Mr. Vallee told him "everything was all right" and to come over and get the deposit and the contract. Plaintiff testified further that about this time the George Bell rang and a real estate salesman named William Deede, accompanied by Mr. and Mrs. Clifford Tarr, prospective purchasers, entered the premises. It appears that Plaintiff knew that Mrs. Berninger was expecting these people to call. Plaintiff testified that Mrs. Berninger greeted Mr. Deede and Mr. and Mrs. Tarr at

the door and told them that the property had been sold; that Mr. Beebe insisted on coming in and that they were permitted to inspect the second floor apartment; that plaintiff told Mrs. Berninger that "so far as we are concerned the deal was made except for the contract and the deposit;" that plaintiff then left defendants' home, went to his office, prepared a form of contract, went to Mr. Vallee's home, had him sign the contract and received a deposit of \$800; that the contract was signed by Mr. Vallee about 4:00 p.m.; that he then telephoned to Mr. Berninger at his home and informed him that he had sold the property to Mr. Vallee; that Mr. Berninger stated that he had sold the building to other people that afternoon; and that plaintiff stated that he was entitled to his commission. A few days later plaintiff returned the amount deposited by the prospective purchaser. There was proof that the reasonable, usual and customary commission for a deal such as plaintiff negotiated was \$725.

Clifford Tarr, called by defendants, testified that he and his wife visited the premises with Mr. Beebe for an inspection on Thursday, March 8, 1945; that they did not see the second floor apartment; that they ^{made} ~~xxx~~ an appointment to return at 2:00 p.m. on Sunday; that they arrived there on Sunday while plaintiff was present; that when they were admitted plaintiff was on the telephone; and that when he came out he said "the house was sold." Witness testified further that Mrs. Berninger agreed to show them the second floor apartment; that plaintiff told witness and his wife that "we would probably not want to buy the place if we saw the upstairs"; that Mrs. Berninger made a statement that "she guessed the house was sold"; that witness did not hear Mrs. Berninger at any time dispute with plaintiff any statement that he (plaintiff) made as to the sale. Mrs. Clifford Tarr, called by defendants,

the door and told them that the property had been sold; that Mr. Debe insisted on seeing it and that they were permitted to inspect the second floor apartment; that plaintiff told Mrs. Berninger that "so far as we are concerned the deal was made except for the contract and the money"; that plaintiff then left defendant's home, went to his office, prepared a form of contract, went to Mr. Vallee's home, had him sign the contract and received a deposit of \$500; that the contract was signed by Mr. Vallee about 4:00 p.m.; that he then telephoned to Mr. Berninger at his home and informed him that he had sold the property to Mr. Vallee; that Mr. Berninger stated that he had sold the building to other people that afternoon; and that plaintiff stated that he was entitled to his commission. A few days later plaintiff returned the amount deposited by the prospective purchaser. There was proof that the reasonable, usual and customary commission for a deal such as plaintiff negotiated was \$750.

Clifford Barr, called by defendant, testified that he and his wife visited the premises with Mr. Debe for an inspection on Thursday, March 8, 1935; that they did not see the second floor apartment; that they saw an apartment to return at 8:00 p.m. on Sunday; that they arrived there on Sunday while plaintiff was present; that when they were admitted plaintiff was on the telephone; and that when he came out he said "the house was sold." Witness testified further that Mr. Berninger agreed to show them the second floor apartment; that plaintiff told witness and his wife that "we would probably not want to buy the place if we saw the upstairs"; that Mrs. Berninger made a statement that "she guessed the house was sold"; that witness did not hear Mrs. Berninger at any time dispute with plaintiff any statement that he (plaintiff) made as to the sale. Mrs. Clifford Barr, called by defendant,

testified that she and her husband entered the premises Sunday afternoon when plaintiff was on the telephone; that after the telephone conversation plaintiff said "the building was sold"; that "Mrs. Berninger did say something about the building, somebody else wants to buy the building. She said the building was sold, she said it to all of us. The real estate man said it should have been sold to us; that we were there first. So then Mrs. Berninger said we had the first chance on it, that we were there first, so we went to see the second floor." Witness testified further that after seeing the second floor they liked the building and wanted to buy the property.

William Beebe, the real estate salesman, testified that when they entered the premises Sunday afternoon plaintiff said the building was sold; that witness asked Mrs. Berninger if she had a contract signed and that she said "no"; that he told Mrs. Berninger that his people had an appointment to see the second floor apartment; that plaintiff said: "You would not like the second floor anyway. You would not like it. I had a hard time selling it to my folks"; that witness answered: "It is for us to decide that"; that he did not hear Mrs. Berninger state that the building was sold; that after inspecting the second floor Mr. and Mrs. Tarr said they would purchase the property; that thereupon plaintiff walked out, stating that he considered that the building was sold to his client; that the Tarrs then accompanied witness to his office, where a contract was signed and a deposit made. The price was \$14,750, but an allowance^{of \$100}/was made to the Tarrs because they agreed to take over the mortgage. Therefore, the ultimate price was \$14,650. Mr. Beebe testified that the property was listed with one of the salesmen in their office at

testified that she and her husband entered the premises Sunday afternoon when plaintiff was on the telephone; that after the telephone conversation plaintiff said "the building was sold"; that "Mr. Berninger did say something about the building, somebody else wants to buy the building." She said the building was sold, she said it to all of us. The next day we said it should have been said to us; that we were there first. So then Mrs. Berninger said we had the first chance on it, that we were there first, so we went to see the second floor." Witness testified further that after seeing the second floor they liked the building and wanted to buy the property.

William Webb, the real estate salesman, testified that when they entered the premises Sunday afternoon plaintiff said the building was sold; that witness asked Mrs. Berninger if she had a contract signed and that she said "no"; that he told Mrs. Berninger that his people had an appointment to see the second floor apartment; that plaintiff said: "You could not like the second floor anyway. You would not like it. I had a hard time selling it to my father"; that witness answered: "It is for us to decide that"; that he did not hear Mrs. Berninger state that the building was sold; that after inspecting the second floor Mr. and Mrs. Webb said they could purchase the property; that thereupon plaintiff walked out, stating that he considered that the building was sold to his client; that the Webbs then accompanied witness to his office, where a contract was signed and a deposit of \$100 made. The price was \$14,750, but an allowance was made to the Webbs because they agreed to take over the mortgage. Therefore, the ultimate price was \$14,650. Mr. Webb testified that the property was listed with one of the salesmen in their office at

a price of \$14,760, and that was the price which Mrs. Berninger quoted to him.

Mrs. Berninger testified that the property was listed at \$14,000; that "whatever he made commission was his business"; that she did not at any time subsequently change the terms of the listing; that on Sunday afternoon, prior to the time she telephoned her husband at his place of employment, plaintiff was endeavoring to induce her to sell the property for less; that he stated the second floor flat would require the expenditure of at least \$500 for remodeling; that she informed him that \$14,000 net was the price she and her husband wanted; that "whatever they did with it after they purchased it was their business"; that she was expecting the Tarrs; that she called her husband on the telephone; that plaintiff spoke to him; that she did not pay any attention to the conversation; that all she heard plaintiff say was "Yes"; that she did not at any time on that afternoon agree with plaintiff on the sale of the property at \$14,500 gross; that she did not tell anyone that afternoon that the building was sold; that she "just made that exclamation" when plaintiff came through the hall and said "the building is sold"; that plaintiff telephoned her home that evening at 8:00 or 8:30 p.m.; and that she answered the telephone and had her husband speak to plaintiff. Recalled as a witness, Mrs. Berninger testified that "Mr. Magruder said, 'Your building is sold,' and before I had a chance to say anything, the other real estate man said, 'You cannot sell it without a contract. Have you got a contract?' And they started arguing from then on." She further stated, "I said, 'The building is sold! ' ".

Plaintiff asserts that where a real estate broker finds a purchaser who is ready, willing and able to purchase the property of the owner, upon the terms fixed by the owner, he is entitled

a price of \$14,750, and that was the price which Mrs. Berninger
offered to him.

Mrs. Berninger testified that the property was listed
at \$14,000; that "whatever he made on the sale was his business";

that she did not at any time subsequently change the terms of
the listing; that on Sunday afternoon, prior to the time she

telephoned her husband at his place of employment, plaintiff was
endeavoring to induce her to sell the property for less; that he

stated the second floor flat would require the expenditure of at
least \$500 for remodeling; that he informed him that \$14,000 net

was the price and her husband stated; that "whatever they did
with it after they purchased it was their business"; that she was

expecting the arra; that she called her husband on the telephone;
that plaintiff spoke to him; that she did not pay any attention

to the conversation; that all she heard plaintiff say was "Yes";
that she did not at any time on that afternoon agree with plaintiff

on the sale of the property at \$14,000 gross; that she did not tell
anyone that afternoon that the building was sold; that she "just

made that explanation" when plaintiff came through the hall and
said "the building is sold"; that plaintiff telephoned her home that

evening at 8:00 or 8:30 P.M.; and that she answered the telephone
and had her husband speak to plaintiff. Deceased as a witness,

Mrs. Berninger testified that "Mr. Berninger said, 'Your building is
sold,' and before I had a chance to say anything, the other real

estate man said, 'You cannot sell it without a contract. Have you
got a contract?' and they started arguing from then on." She

further stated, "I said, 'The building is sold.'"
Plaintiff asserts that where a real estate broker finds

a purchaser who is ready, willing and able to purchase the property
at the price, upon the terms fixed by the owner, he is entitled

to his commission if the sale is not consummated because of the owner's refusal or inability to sell. Defendants concede this to be the law. Plaintiff does not contend that the judgment is contrary to the manifest weight of the evidence. He asserts that the evidence shows without contradiction that he procured William Vallee as the buyer; that the deal was accepted by defendants; that he procured a signed contract and a deposit; that he earned his commission despite the fact that defendants subsequently decided to sell to Mr. and Mrs. Tarr; and that the decision to sell to the Tarrs was the fault of defendants and cannot deprive him of his commission. The Tarrs looked at the property on Thursday and the mother and step-father of Mr. Vallee looked at it on Saturday. Both groups were interested in purchasing the property. On Thursday the Tarrs did not inspect the second floor apartment. They made an appointment to make that inspection at 2:00 p.m. Sunday afternoon. Mr. and Mrs. Vallee, Mrs. Greve and plaintiff came to the premises Sunday morning. They were desirous of purchasing and so informed plaintiff. After leaving, they repaired to the office of plaintiff. He then telephoned Mrs. Berninger that he was working out a deal for her. At about 1:30 Sunday afternoon he returned to the premises and talked to Mrs. Berninger. At that time she called her husband on the telephone at the place where he worked and plaintiff talked to him. There is a conflict in the testimony as to the list price of the property. Plaintiff's testimony is that it was listed with him at \$14,500, from which would be deducted his commission of 5%. Defendants' testimony is that the real estate was listed with him at \$14,000 net and that his commission would be obtained by procuring a purchaser who would pay more than that figure. The testimony of plaintiff and Mr. Berninger is in conflict as to the purchase price discussed on

to his commission if the sale is not consummated because of the owner's refusal or inability to sell. Defendants concede this to be the law. Plaintiff does not contend that the judgment is contrary to the manifest weight of the evidence. He asserts that the evidence above without contradiction that he procured William Vallee as the buyer; that the deal was accepted by defendants; that he procured a signed contract and a deposit; that he earned his commission despite the fact that defendants subsequently decided to sell to Mr. and Mrs. Tarr; and that the decision to sell to the Tarrs was the result of defendants and cannot deprive him of his commission. The Tarrs looked at the property on Thursday and the mother and step-father of Mr. Vallee looked at it on Saturday. Both groups were interested in purchasing the property. On Sunday the Tarrs did not inspect the second floor apartment. They made an appointment to make that inspection at 2:00 p.m. Sunday afternoon. Mr. and Mrs. Vallee, Mrs. Grove and Plaintiff went to the premises Sunday morning. They were anxious of purchasing and so informed Plaintiff. After leaving, they returned to the office of Plaintiff. He then telephoned Mr. Tarr and that he was working out a deal for her. At about 1:30 Sunday afternoon he returned to the premises and talked to Mr. Tarr. At that time she called her husband on the telephone at the place where he worked and Plaintiff talked to him. There is a conflict in the testimony as to the last offer of the property. Plaintiff's testimony is that it was listed with him at \$1,200, from which would be deducted his commission of \$1,000. Defendants' testimony is that the real estate was listed with him at \$14,000 net and that his commission would be obtained by securing a purchaser who would pay more than that figure. The testimony of Plaintiff and Mr. Tarr is in conflict as to the purchase price discussed on

the telephone, and also as to whether any agreement for a deal was made in the telephone conversation. The testimony of Mr. Beebe indicates that the real estate was listed with his office at \$14,750. Plaintiff's testimony is that the property was listed with him at \$14,500 and that it was sold by him for that figure and that he was to receive a commission of 5%, or \$725. On the deal which plaintiff contends he negotiated, defendants would receive \$14,500, less \$725 commission, or \$13,775. The commission on the price of \$14,750 would be \$737.50, which would leave defendants with approximately the same amount as the net of \$14,000, which they say was the listing given to plaintiff.

It is apparent that Mrs. Berninger did not wish to make the deal which plaintiff was negotiating without consultation with her husband. After the telephone conversation, plaintiff announced that the property was sold. The record shows that Mrs. Berninger repeated that assertion. Under all of the facts it was for the trial judge to decide on the credibility of the witnesses and the weight to be given to their testimony. From the actions and statements of Mrs. Berninger it is apparent, despite her statement that the property was sold, that she was uttering an exclamation. Her actions at the time indicate that she did not believe that the deal had been made, for she stated that the Tarrs were the first people to view the property and that they should have the first opportunity to purchase it, and she also showed the Tarrs through the second floor apartment.

We are not asked to remand for a new trial on the basis that the judgment is contrary to the manifest weight of the evidence. We are asked to give judgment for plaintiff on the basis that the evidence shows without contradiction that plaintiff has sustained his case. A perusal of the testimony shows that there was a serious

the telephone, and also as to whether any agreement for a deal was made in the telephone conversation. The testimony of Mr. [redacted] indicates that the real estate was listed with his office at \$14,750. Plaintiff's testimony is that the property was listed with him at \$14,500 and that it was sold by him for that figure and that he was to receive a commission of 8% or \$728. On the deal which Plaintiff contends he negotiated, defendant would receive \$4,500, less \$728 commission, or \$3,772. The commission on the price of \$14,750 would be \$728.00, which would leave defendant with approximately the same amount as the net of \$4,500, which they say was the listing given to Plaintiff.

It is apparent that Mrs. Berninger did not wish to make the deal which Plaintiff was negotiating without consultation with her husband. After the telephone conversation, Plaintiff announced that the property was sold. The record shows that Mrs. Berninger requested that attention. Under all of the facts it was for the trial judge to decide on the credibility of the witnesses and the weight to be given to their testimony. From the evidence and statements of Mrs. Berninger it is apparent, despite her statement that the property was sold, that she was uttering an exclamation. Her action at the time indicates that she did not believe that the deal had been made, for she stated that the "latter" were the first people to view the property and that they should have the first opportunity to purchase it, and she also showed the latter through the second floor apartment.

We are not asked to award for a new trial on the basis that the judgment is contrary to the manifest weight of the evidence. We are asked to set aside the judgment for Plaintiff on the basis that the evidence shows without substantial doubt that Plaintiff was sustained in his case. A review of the testimony shows that there was a serious

conflict as to the terms of the listing. To uphold plaintiff's contention, we would have to accept the testimony on behalf of plaintiff that the property was listed at \$14,500, subject to commission, and reject the testimony introduced by defendants that their only offer through plaintiff was for \$14,000 net. The case presented a question of fact for the trial judge as to the credibility of the witnesses and the weight to be given their testimony. Under the record we would not be justified in disturbing the judgment. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND LEWE, J. CONCUR.

conflict as to the terms of the listing. To avoid plaintiff's
objection, we would have to accept the testimony on behalf of
plaintiff that the property was listed at \$14,500, subject to
commission, and reject the testimony introduced by defendant
that their offer through plaintiff was for \$14,000 net.
The case presented a question of fact for the trial judge as to
the credibility of the witnesses and the weight to be given their
testimony. Under the record we would not be justified in disturbing
the judgment. Therefore, the judgment of the municipal court of
Chicago is affirmed.

JUDGMENT AFFIRMED.

RIGHT, W. J. AND KIRK, J. CONCUR.

43699

PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

BRUNO AUSTIN, ALEX SHAPIRO, MORRIS
JACOBS and DAVID SINNENBERG,

Appellants.

APPEAL FROM

CRIMINAL COURT

COOK COUNTY.

329 I.A. 276

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Appellants, hereinafter referred to as defendants, filed a motion in writing in the nature of a writ of error coram nobis under section 72 of the Civil Practice Act in the Criminal Court of Cook County, seeking to review and vacate a judgment entered against them on a verdict of a jury finding defendants guilty of murder. Defendants appeal from an order denying their motion. The original judgment of conviction was reviewed and affirmed in our Supreme Court. (People v. Shapiro, 371 Ill. 234.)

The record discloses that on July 15, 1935, while defendants were attempting to rob a grocery store owned by Vincent De Rosa, a customer, Anthony Benidetto was fatally shot. In the original proceeding defendants testified that they were all armed when they entered the grocery but did not fire any shots. One of the defendants, Bruno Austin, testified that Samuel De Rosa had a pistol in his hand which he fired at the defendants. Samuel De Rosa, called as a witness for the People, stated that he slept throughout the attempted robbery and did not come out of his room until the shooting was over.

On August 23, 1945, Samuel De Rosa, then a private in the United States Army, made an affidavit in which he stated that, "I shot at the defendants in the act of stopping the attempted holdup and in defense of my home, and as a result Anthony Benidetto was accidentally shot."

STATE OF TEXAS, COUNTY OF DALLAS,

Know all men by these presents,

I, JAMES EARL RAY,

do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the County of Dallas, Texas.

Witness my hand and seal of office this 10th day of July, 1968.

ATTEST:

CLERK OF DISTRICT COURT

COUNTY OF DALLAS, TEXAS

3231.A.276

NO. 10095 WAS RECEIVED BY THE CLERK OF THE COURT.

Appellants, hereinafter referred to as defendants,

filed a motion in writing in the nature of a writ of certiorari under section 75 of the Civil Practice Act in the Criminal Court of Cook County, seeking to review and vacate a judgment entered against them on a verdict of a jury finding defendants guilty of murder. Defendants appeal from an order denying their motion. The original judgment of conviction was reviewed and

affirmed in our Supreme Court. (People v. Ray, 371 Ill. 534.)

The record discloses that on July 16, 1968, while defendants

were attempting to rob a grocery store owned by Vincent De Rosa,

a customer, Anthony Gentileto was fatally shot. In the original

proceeding defendants testified that they were all armed when

they entered the grocery but did not fire any shots. One of the

defendants, Bruno Austin, testified that Daniel De Rosa had a

pistol in his hand which he fired at the defendants. Daniel

De Rosa, called as a witness for the People, stated that he also

throughout the attempted robbery and did not come out of his room

until the shooting was over.

On August 28, 1948, Daniel De Rosa, then a private in

the United States Army, made an affidavit in which he stated that,

"I shot at the defendants in the act of stopping the attempted

robbery and in defense of my home, and as a result Anthony Gentileto

was accidentally shot."

The gist of defendants' petition (motion) is that the false testimony given by De Rosa in the former proceeding resulted in the verdict of the jury finding defendants guilty of murder; that the People cannot invoke the five-year limitation for the reason that the defendants have not been permitted to file any proceedings during their incarceration until recent date and their efforts to file a writ of error coram nobis were stopped because their petitions were never permitted to pass the prison gates. The petition concludes by praying that defendants be released from incarceration.

The People filed a written motion to dismiss, averring, inter alia that the petition of the defendants was not filed "within the period provided by law for obtaining the relief prayed."

Defendants' theory of the case is that the exhibits and judgment of the Supreme Court (People v. Shapiro, 371 Ill. 234), viewed in the light of the confession of Samuel De Rosa, were sufficient to warrant the court in granting the relief prayed for in the petition.

The sole question presented is whether defendants are barred by limitation where their motion is filed more than five years after conviction. This precise question was determined in the recent case of People v. Rave, 392 Ill. 435. There substantially the same arguments were advanced as in the case at bar. Rave urged that he was not free to carry on the necessary litigation during his imprisonment, that this constituted duress, and therefore the five-year limitation did not apply. The court said, at page 444:

The list of defendants' petition (motion) is that the false testimony given by the State in the former proceedings resulted in the verdict of the jury finding defendant guilty of murder; that the People cannot invoke the five-year limitation for the reason that the defendants have not been permitted to file any proceeding during their incarceration until recent date and their efforts to file a writ of error were refused because their petitions were never permitted to reach the proper offices. The petition concludes by praying that defendants be released from incarceration.

The People filed a written motion to dismiss, averring, inter alia, that the petition of the defendants was not filed within the period provided by law for obtaining the relief prayed. The defendants' theory of the case is that the evidence and judgment of the Supreme Court (People v. Phillips, 271 Ill. 134), viewed in the light of the confession of Oswald as false, were sufficient to warrant the court in granting the relief prayed for in the petition.

The main question presented is whether defendants were barred by limitation when their motion is filed more than five years after conviction. This precise question was determined in the recent case of People v. Ryan, 282 Ill. 432. There defendants timely the same arguments were advanced as in the case at bar. It was urged that he was not free to carry on the necessary litigation during his imprisonment, that this constituted excuse, and therefore the five-year limitation did not apply. The court said:

at page 444:

"A motion for writ of error coram nobis may be heard after the defendant has been imprisoned and is serving his sentence, and the court may, upon a proper writ, have the defendant brought into court for such hearing, if necessary.' We do not believe that this constitutes duress within the meaning of said exception in the provision fixing the period of limitation at five years.

"Counsel, in his reply brief, says that this five-year limitation 'is to be found under the Civil Practice Act and that there is no limitation as to criminal cases.' However, the language in the concluding sentence of section 72 contemplates a criminal proceeding, as well as civil, because the section excludes from the period of limitation such time as the person entitled to make the motion may be under disability or under duress, and said period of five years commences at the time 'of passing judgment,' and this language can have application only to a criminal case. Furthermore, the only statute providing for this proceeding by motion in the nature of a writ of error coram nobis is to be found in the Civil Practice Act. This court, in People v. Sprague, 371 Ill. 627, which was a murder case, held that while a motion is allowed under the statute for the correction of errors of fact it must be presented within five years of the rendition of the judgment, and under no other circumstances does a court have power to vacate a judgment of conviction after a defendant has commenced his sentence and after the end of the term of court at which he was convicted."

In the instant case the record shows that the defendants were convicted on October 25, 1935, and that the conviction was affirmed by the Supreme Court on February 20, 1939 and rehearing denied on April 12, 1939. The present petition for a writ of error coram nobis was not filed until August 31, 1945, a lapse of almost ten years after defendants were convicted.

In the light of these facts defendants' position is untenable.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

"A motion for writ of error coram nobis may be heard after the defendant has been re-arrested and is serving his sentence, and the court may, upon a proper writ, have the defendant brought into court for such hearing, if necessary." We do not believe that this constitutes a bar within the meaning of said statute in the present fixing the date of limitation at five years.

"Concededly, in his reply brief, says that this five-year limitation is to be found under the Civil Practice Act and that there is no limitation as to criminal cases. However, the language in the concluding sentence of section 72 constitutes a criminal proceeding, as well as civil, because the section excludes from the period of limitation such time as the person entitled to make the motion may be under disability or under duress, and said period of five years commences at the time 'of passing judgment,' and this language can have application only to a criminal case. Furthermore, the only statute providing for this proceeding by motion in the nature of a writ of error coram nobis is to be found in the Civil Practice Act. This court, in People v. People, 271 Ill. 497, which was a murder case, held that while a motion is allowed under the statute for the correction of errors of fact it will be presented within five years of the rendition of the judgment, and under no other circumstances does a court have power to vacate a judgment of conviction after a defendant has commenced his sentence and after the end of the term of court at which he was convicted."

In the instant case the record shows that the defendants were convicted on October 24, 1935, and that the conviction was affirmed by the Supreme Court on February 9, 1937 and rehearing denied on April 12, 1939. The present petition for a writ of error coram nobis was not filed until August 31, 1940, a lapse of almost ten years after defendants were convicted.

In the light of these facts defendants' petition is

untenable.

For the reasons stated, the judgment is affirmed.

FORWARDED AT CHICAGO.

ALLEN, J. J. & SONS, 41 CANTON.

43363

COLUMBIA CASUALTY COMPANY,
a corporation,

Appellant,

v.

EDWARD MITCHELL, DAVID JAYNES,
individually and as Administrator
of the Estate of HATTIE NESBIT,
sometimes known as Hattie Mitchell,
deceased, MATHILDA DURHAM, JANIE
ROBINSON, GEORGIA TYERRELL, CARRIE
BELL MARTIN and LUELLEN PARROTT,

Defendants,

EDWARD MITCHELL,

Appellee.

329 I.A. 825¹

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

139

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by a surety to nullify a decree, of the Circuit Court, ordering its principal, administrator of decedent's estate, to make distribution. The trial court struck the complaint and dismissed the suit. Plaintiff appeals.

Hattie Nesbit married Edward Mitchell on December 26, 1899 in Georgia. She was granted a divorce from him in the Circuit Court of Cook County, Illinois, April 18, 1924. On May 7, 1930 she died intestate, leaving no children. May 14, 1930, David Jaynes, her nephew, was made administrator of her estate in the Probate Court of Cook County. Plaintiff was surety on his bond. June 30, 1930, proof of heirship was made which did not include Mitchell.

In 1931 Jaynes inventoried \$1,043.73 personal property and four parcels of real estate. January 20, 1932 Edward Mitchell filed his complaint in the Circuit Court to set aside the decree of divorce granted to the decedent. A decree in his favor was

226

COLUMBIA CASUALTY COMPANY,
a corporation,

Appellant,

v.

EDWARD MITCHELL, DAVID JAYNES,
individually and as Administrator
of the Estate of HATTIE MITCHELL,
sometimes known as Hattie Mitchell,
deceased, MATILDA DUNHAM, JAMIE
ROBINSON, GEORGIA TYRRELL, CARLIE
BELL MARTIN and LINDA RAYMOND,

Defendants,

EDWARD MITCHELL,

Appellee.

MR. PRESIDING JUSTICE KILLY DELIVERED THE OPINION OF THE COURT.

This is an action by a surety to nullify a

decree of the Circuit Court, ordering its principal, administrator

of decedent's estate, to make distribution. The trial court
struck the complaint and dismissed the suit. Plaintiff appeals.

Hattie Mitchell married Edward Mitchell on December 8,

1899 in Georgia. She was granted a divorce from him in the

Circuit Court of Cook County, Illinois, April 18, 1924. On May 7,

1930 she died intestate, leaving no children. May 14, 1930,

David Jaynes, her nephew, was made administrator of her estate

in the Probate Court of Cook County. Plaintiff was surety on

his bond. June 30, 1930, proof of heirship was made which did

not include Mitchell.

In 1931 Jaynes inventoried \$1,043.75 personal property

and four parcels of real estate. January 30, 1932 Edward Mitchell

filed his complaint in the Circuit Court to set aside the decree

of divorce granted to the decedent. A decree in his favor was

3291A.123

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

22
granted April 11, 1939, as a result of which a receiver was appointed for the decedent's real estate. The decree of April 11, 1939 nullified the divorce decree, found Mitchell was the surviving spouse and owner of one-half of the real estate and entitled to a dower of the other half, and ordered partition or sale of the real estate. October 10, 1939, the Probate Court on motion of Mitchell amended its records to show that the decedent was Mitchell's wife and to include Mitchell as an heir.

May 20, 1942 the administrator filed an amended final account showing, but not itemizing receipts of \$4,156.93 and disbursements of \$4,228.34. Mitchell filed objections which were overruled. On appeal to the Circuit Court some of his objections were sustained and the administrator ordered to recast his account.

January 7, 1943, Jaynes filed his account as recast, showing receipts of \$4,156.93, disbursements of \$2,729.50 and a balance for distribution of \$1,427.43. This account was approved by the Circuit Court on January 7, 1943 and distribution ordered. May 14, 1943 the Probate Court directed the administrator to pay Mitchell the balance shown in the account of \$1,427.43. The administrator failed to pay the same to Mitchell and he demanded payment from plaintiff.

The gist of the complaint is that the Probate Court records show that the receipt of \$4,156.93, shown in the administrator's account, consisted of \$3,113.20 of income from the real estate; that in collecting this income Jaynes was not acting as administrator; that most of the disbursements shown in the account were expenses connected with that real estate and not proper items; that the Probate and Circuit Courts were without jurisdiction to pass upon those items and their orders with respect thereto were void; that the inclusion of the improper items was the result of

#

227

granted April 11, 1939, as a result of which a receiver was appointed for the decedent's real estate. The decree of April 11, 1939 nullified the divorce decree, found Mitchell was the surviving spouse and owner of one-half of the real estate and entitled to a dower of the other half and ordered partition or sale of the real estate. October 10, 1939, the Probate Court on motion of Mitchell amended its records to show that the decedent was Mitchell's wife and to include Mitchell as an heir.

May 20, 1943 the administrator filed an amended final account showing, but not itemizing receipts of \$4,168.95 and disbursements of \$4,938.54. Mitchell filed objections which were overruled. On appeal to the Circuit Court some of his objections were sustained and the administrator ordered to recast his account.

January 7, 1943, Jaynes filed his account as recast, showing receipts of \$4,168.95, disbursements of \$2,739.50 and a balance for distribution of \$1,427.45. This account was approved by the Circuit Court on January 7, 1943 and distribution ordered. May 14, 1943 the Probate Court directed the administrator to pay Mitchell the balance shown in the account of \$1,427.45. The administrator failed to pay the same to Mitchell and he demanded payment from plaintiff.

The gist of the complaint is that the Probate Court records show that the receipt of \$4,168.95, shown in the administrator's account, consisted of \$3,115.90 of income from the real estate; that in collecting this income Jaynes was not acting as administrator; that most of the disbursements shown in the account were expenses connected with that real estate and not proper items that the Probate and Circuit Courts were without jurisdiction to pass upon those items and their orders with respect thereto were void; that the inclusion of the former items was the result of

3
mistake, collusion or fraud; that plaintiff relied upon the advice of administrator's counsel that decedent's estate was closed June 5, 1942; that it had no knowledge of the falsity of that advice until Mitchell's demand upon it June 25, 1943; and that thereupon it investigated and learned the facts too late to appeal in the proceedings affecting the estate.

84
89
Jaynes admitted in his answer that the Probate and Circuit Courts were without jurisdiction to pass on the income from the real estate; that the allegations with respect to the false advice on the closing of the estate were true; and that, as administrator, the only proper items of account were those other than the income from the real estate. Mitchell denied that any items were improper or were included by mistake, collusion or fraud; that the Probate and Circuit Courts lacked jurisdiction; that \$1,043.73 was the only personal property left by decedent or that the account should have been limited to that sum; and he contends that the matters alleged are res judicata.

Attached to the complaint was a copy of the condition of plaintiff's bond, which shows that liability is limited to moneys which came into the hands of Jaynes as administrator; copy of a petition of the administrator filed April 24, 1942, stating that he had collected rents and profits from decedent's real estate amounting to \$4,166.43 up to the appointment of the receiver; copy of the amended final account before recasting which shows among disbursements many items of expense in connection with the real estate; Mitchell's objections to that account; copy of the Circuit Court order sustaining some of the objections, overruling others and ordering the recasting; copy of the recast account showing the reduction of disbursements and the balance in the administrator's

8

mistake, collusion or fraud; that plaintiff relied upon the advice of administrator's counsel that decedent's estate was closed June 5, 1942; that it had no knowledge of the falsity of that advice until Mitchell's demand upon it June 26, 1942; and that thereupon it investigated and learned the facts too late to appeal in the proceedings affecting the estate.

Jaynes admitted in his answer that the Probate and Circuit Courts were without jurisdiction to pass on the income from the real estate; that the allegations with respect to the false advice on the closing of the estate were true; and that as administrator, the only proper items of account were those other than the income from the real estate. Mitchell denied that any items were improper or were included by mistake, collusion or fraud; that the Probate and Circuit Courts lacked jurisdiction that \$1,043.73 was the only personal property left by decedent or that the account should have been limited to that sum; and he contends that the matters alleged are res judicata.

Attached to the complaint was a copy of the condition of plaintiff's bond, which shows that liability is limited to moneys which came into the hands of Jaynes as administrator; copy of a petition of the administrator filed April 24, 1942, stating that he had collected rents and profits from decedent's real estate amounting to \$1,188.45 up to the appointment of the receiver; copy of the amended final account before receiving which shows among disbursements any items of expense in connection with the real estate; Mitchell's objections to that account; copy of the Circuit Court order sustaining some of the objections, overruling others and ordering the receiving; copy of the receipt account showing the reduction of disbursements and the balance in the administrator's

4
hands; and the order approving the account as recast and ordering distribution in accordance with the table of heirship in the Probate Court.

ae 2
November 1, 1943 Mitchell moved to strike the complaint as insufficient and as barred by the judgments which it sought to attack. This motion was overruled May 18, 1944. October 26, 1944, plaintiff presented evidence in support of his complaint. October 30, 1944, Mitchell moved to strike the complaint, claiming it was an original bill, in the nature of a bill of review relying on new matter requiring extrinsic evidence and, leave to file the same not having been given. The trial court sustained the motion November 17th. Subsequently, on November 20, that order was vacated and an order entered which recited the taking of the evidence and Mitchell's motion. It ordered the complaint stricken and the suit dismissed.

[4.2] The complaint seeks reversal of the orders of the Probate and Circuit Courts for error apparent on the face thereof and for fraud. It is a bill of review, People v. Sterling, 357 Ill. 354, maintainable by plaintiff, a privy to an original party. Moore v. Shook, 276 Ill. 47. No leave of court was required for filing the complaint. Griggs v. Gear, 3 Ill. 2; Harrigan v. County of Peoria, 262 Ill. 36; Ullrich v. Ullrich, 299 Ill. App. 460 and 19 Am. Jur. 302. The court erred, therefore, in sustaining the motion to strike.

The fact that evidence was taken did not change the character of the proceeding to a bill in the nature of a bill of review for newly discovered evidence. The evidence was taken in support of the charges of fraud and mistake and to show the effect of the error upon the estate and the accounts of the administrator.

[3.5] To determine whether there is error apparent upon the face of the decree, we shall examine all the pleadings and the

hands; and the order approving the account as correct and ordering distribution in accordance with the table of befriend in the Probate Court.

November 1, 1943 Mitchell moved to strike the complaint

as insufficient and as barred by the judgments which it sought to attack. This motion was overruled May 18, 1944. October 28,

1944, plaintiff presented evidence in support of his complaint.

October 30, 1944, Mitchell moved to strike the complaint, claiming

it was an original bill, in the nature of a bill of review relying

on new matter regarding extrinsic evidence and, leave to file the

same not having been given. The trial court sustained the motion

November 17th. Subsequently, on November 20, that order was vacated

and an order entered which recited the taking of the evidence and

Mitchell's motion. It ordered the complaint stricken and the suit

dismissed.

The complaint seeks reversal of the order of the Probate

and Circuit Courts for error apparent on the face thereof and for

frand. It is a bill of review. People v. Sterling, 327 Ill. 354,

Moore v. maintainable by plaintiff, a privy to an original party.

Shook, 278 Ill. 47. No leave of court was required for filing the

complaint. Grier v. Gier, 3 Ill. 2; Hartman v. County of Peoria,

322 Ill. 32; Ulrich v. Ulrich, 299 Ill. App. 450 and 19 Am. Jur.

302. The court erred, therefore, in sustaining the motion to strike.

The fact that evidence was taken did not change the

character of the proceeding to a bill in the nature of a bill of

review for newly discovered evidence. The evidence as taken in

support of the charges of frand and mistake and to show the effect

of the error upon the estate and the accounts of the administrator.

To determine whether there is error apparent upon the

face of the decree, we shall examine all the pleadings and the

5
record, as well as the decree. Harrigan v. County of Peoria. Plaintiff alleges that rents from decedent's real estate were included in the "administrator's receipts." The Administrator states in his petition of April 24, 1942, that he collected \$4,166.43 in rents. Although the petition was filed in the Probate Court it was before the Circuit Court on appeal. Neither the Probate Court nor the Circuit Court on appeal had jurisdiction to pass upon the rents. Green v. Massie, 13 Ill. 363; Foltz v. Prouse, 17 Ill. 487; Haynes v. McDonald, 158 Ill. App. 294; Grotefendt v. Schlaeppli-Siever, et al, 213 Ill. App. 436. The case of Goeppner v. Leitzetmann, 98 Ill. 409, cited by defendant, does not state a different rule. Where lack of jurisdiction appears in a pleading there is error apparent on the face of the decree. 19 Am. Jur. 297. The decree of the court in so far as it passed upon the rents, is void. The entire decree, however, is not void, since the void part is separable from the valid. People v. Seelye, 146 Ill. 189, 224.

Since we hold that that part of the decree which passed on the rent was void, we need not consider defendant's contentions that at most the Circuit Court decree was merely erroneous and could still be res judicata, and that the judgment against the administrator is binding against plaintiff. We need not consider whether fraud was shown. The lack of jurisdiction is sufficient to avoid the decree to the extent noted,

Defendant argues that the administrator was chargeable with 10 per cent interest per year after the expiration of two years following the issuance of letters of administration under Chap. 3, Par. 462, Ill. Rev. Stats. This paragraph does not apply unless there is personalty distributable and, moreover, it is clear that for most of the period during which the estate was open, Mitchell's

289
290

record, as well as the decree. Harrison v. County of Georgia, Plaintiff alleges that rents from decedent's real estate were included in the "administrator's receipts." The Administrator states in his petition of April 24, 1942, that he collected \$4,168.43 in rents. Although the petition was filed in the Probate Court it was before the Circuit Court on appeal. Neither the Probate Court nor the Circuit Court on appeal had jurisdiction to pass upon the rents. Green v. Nassie, 13 Ill. 263; Kelce v. Frouse, 17 Ill. 487; Haynes v. McDonald, 158 Ill. App. 294; Grotelund v. Schlegel-Siever, 213 Ill. App. 438. The case of Leitzmann v. Leitzmann, 28 Ill. 408, cited by defendant, does not state a different rule. Where lack of jurisdiction appears in a pleading there is error apparent on the face of the decree. 19 Am. Jur. 287. The decree of the court in so far as it passed upon the rents, is void. The entire decree, however, is not void, since the void part is separable from the valid. People v. Geelye, 148 Ill. 188, 224. Since we hold that that part of the decree which passed on the rent was void, we need not consider defendant's contention that at most the Circuit Court decree was merely erroneous and could still be res judicata, and that the judgment against the administrator is binding against plaintiff. We need not consider whether fraud was shown. The lack of jurisdiction is sufficient to avoid the decree to the extent noted.

Defendant argues that the administrator was chargeable with 10 per cent interest per year after the expiration of two years following the issuance of letters of administration under Chap. 3, Par. 462, Ill. Rev. Stats. This paragraph does not apply unless there is personalty distributable and, moreover, it is clear that for most of the period during which the estate was open, Mitchell's

6
litigation with respect thereto was pending.

9 [6] Because of lack of jurisdiction apparent upon the "face of the decree" in the appeal from the Probate Court, the trial court in the instant proceeding committed error in dismissing plaintiff's suit. The decree of the Circuit Court in the Hattie Nesbit appeal should be nullified in so far as it purports to make any findings or orders with respect to income from, or disbursements in connection with, the decedent's real estate.

For the reasons given hereinabove the decree appealed from is reversed and the cause is remanded with directions to the trial court to recast the administrator's account in accordance with the principles herein announced and to enter a decree accordingly. The complaint in this proceeding does not reach the Probate Court order. The People v. Sterling.

Cap. *ital c & k*
DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LEWE AND BURKE, JJ. CONCUR.

231

litigation with respect thereto was pending.

Because of lack of jurisdiction apparent upon the "face of the decree" in the appeal from the Probate Court, the trial court in the instant proceeding committed error in dismissing plaintiff's suit. The decree of the Circuit Court in the Hattie Nesbitt appeal should be nullified in so far as it purports to make any findings or orders with respect to income tax, or disbursements in connection with the decedent's real estate.

For the reasons given hereinabove the decree appealed from is reversed and the cause is remanded with directions to the trial court to recast the administrator's account in accordance with the principles herein announced and to enter a decree accordingly. The complaint in this proceeding does not reach the Probate Court order. The People v. Sterling.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LEWIS AND BORD, JJ. CONCUR.

13

43363

COLUMBIA CASUALTY COMPANY, a
corporation,

Appellant,

v.

EDWARD MITCHELL, DAVID JAYNES,
individually and as Administrator
of the Estate of HATTIE NESBIT,
sometimes known as Hattie Mitchell,
deceased, MATHILDA DURHAM, JANIE
ROBINSON, GEORGIA TYERRELL, CARRIE
BELL MARTIN and LUELLEN PARROTT,

Defendants,

EDWARD MITCHELL,

Appellee.

329 I.A. 25²

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

139

ON REHEARING.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action by a surety to nullify a decree,
of the Circuit Court, ordering its principal, administrator of
decendent's estate, to make distribution. The trial court
struck the complaint and dismissed the suit. Plaintiff appeals.

Hattie Nesbit married Edward Mitchell on December 26,
1899 in Georgia. She was granted a divorce from him in the
Circuit Court of Cook County, Illinois, April 18, 1924. On May 7,
1930 she died intestate, leaving no children. May 14, 1930,
David Jaynes, her nephew, was made administrator of her estate
in the Probate Court of Cook County. Plaintiff was surety on
his bond. June 30, 1930, proof of heirship was made which did
not include Mitchell.

In 1931 Jaynes inventoried \$1,043.73 personal property
and four parcels of real estate. January 20, 1932 Edward Mitchell
filed his complaint in the Circuit Court to set aside the decree
of divorce granted to the decedent. A decree in his favor was

COLUMBIA CASUALTY COMPANY, a corporation,

Appellant,

v.

EDWARD MITCHELL, DAVID JAYNES, individually and as Administrator of the estate of EATIE MITCHELL, sometimes known as EATIE MITCHELL, deceased, MARION BURNHAM JAMES, deceased, MARION EYRELL, CAROL, WILLIAM and LILLIAN PATENT,

Defendants,

EDWARD MITCHELL,

Appellee.

OPINION.

THE FOLLOWING JUSTICE KILBY DELIVERED THE OPINION OF THE COURT.

This is an action by a surety to nullify a decree,

of the Circuit Court, ordering the principal, administrator of

decedent's estate, to make distribution. The trial court

struck the complaint and dismissed the suit. Plaintiff appeals.

Nattie Nesbit married Edward Mitchell on December 28,

1900 in Georgia. He was granted a divorce from him in the

Circuit Court of Cook County, Illinois, April 18, 1904. On May 7,

1930 she died intestate, leaving no children. May 14, 1930,

David Jaynes, her nephew, was made administrator of her estate

in the Probate Court of Cook County. Plaintiff was surety on

his bond. June 30, 1930, proof of guardianship was made which did

not include Mitchell.

In 1931 Jaynes inventoried \$1,043.73 personal property

and four parcels of real estate. January 20, 1932 Edward Mitchell

filed his complaint in the Circuit Court to set aside the decree

of divorce granted to the decedent. A decree in his favor was

3291.A. 35

APRIL 1930

CIRCUIT COURT

COOK COUNTY.

1930
v

granted April 11, 1939, as a result of which a receiver was appointed for the decedent's real estate. The decree of April 11, 1939 nullified the divorce decree, found Mitchell was the surviving spouse and owner of one-half of the real estate and entitled to a dower in the other half, and ordered partition or sale of the real estate. October 10, 1939, the Probate Court on motion of Mitchell amended its records to show that the decedent was Mitchell's wife and to include Mitchell as an heir.

May 20, 1942 the administrator filed an amended final account showing, but not itemizing receipts of \$4,156.93 and disbursements of \$4,228.34. Mitchell filed objections which were overruled. On appeal to the Circuit Court some of his objections were sustained and the administrator ordered to recast his account.

January 7, 1943, Jaynes filed his account as recast, showing receipts of \$4,156.93, disbursements of \$2,729.50 and a balance for distribution of \$1,427.43. This account was approved by the Circuit Court on January 7, 1943 and distribution ordered. May 14, 1943 the Probate Court directed the administrator to pay Mitchell the balance shown in the account of \$1,427.43. The administrator failed to pay the same to Mitchell and he demanded payment from plaintiff.

The gist of the complaint is that the Probate Court records show that the receipt of \$4,156.93, shown in the administrator's account, consisted of \$3,113.20 of income from the real estate; that in collecting this income Jaynes was not acting as administrator; that most of the disbursements shown in the account were expenses connected with that real estate and not proper items; that the Probate and Circuit Courts were without jurisdiction to pass upon those items and their orders with respect thereto were void; that the inclusion of the improper items was the result of

granted April 11, 1938, as a result of which a receiver was appointed for the decedent's real estate. The decree of April 11, 1938 nullified the divorce decree, found Mitchell was the surviving spouse and owner of one-half of the real estate and entitled to a dower in the other half, and ordered partition or sale of the real estate. October 10, 1938, the Probate Court on motion of Mitchell amended the records to show that the decedent was Mitchell's wife and to include Mitchell as an heir.

May 20, 1943 the administrator filed an amended final account showing, but not itemizing receipts of \$1,186.93 and disbursements of \$288.34. Mitchell filed objections which were overruled. On appeal to the Circuit Court some of his objections were sustained and the administrator ordered to recast his account. January 7, 1943, Jaynes filed his account as recast, showing receipts of \$1,186.93, disbursements of \$278.50 and a balance for distribution of \$1,437.43. This account was approved by the Circuit Court on January 7, 1943 and distribution ordered. May 14, 1943 the Probate Court ordered the administrator to pay Mitchell the balance shown in the account of \$1,437.43. The administrator failed to pay the same to Mitchell and he demanded payment from plaintiff.

The list of the complaint is that the Probate Court records show that the receipt of \$1,186.93, shown in the administrator's account, consisted of \$1,113.73 of income from the real estate; that in collecting this income Jaynes was not acting as administrator; that most of the disbursements shown in the account were expenses connected with that real estate and not proper items; that the Probate and Circuit Courts were without jurisdiction to pass upon these items and their orders with respect thereto were void; that the inclusion of the improper items was the result of

mistake, collusion or fraud; that plaintiff relied upon the advice of administrator's counsel that decedent's estate was closed June 5, 1942; that it had no knowledge of the falsity of that advice until Mitchell's demand upon it June 25, 1943; and that thereupon it investigated and learned the facts too late to appeal in the proceedings effecting the estate.

Jaynes admitted in his answer that the Probate and Circuit Courts were without jurisdiction to pass on the income from the real estate; that the allegations with respect to the false advice on the closing of the estate were true; and that, as administrator, the only proper items of account were those other than the income from the real estate. Mitchell denied that any items were improper or were included by mistake, collusion or fraud; that the Probate and Circuit Courts lacked jurisdiction; that \$1,043.73 was the only personal property left by decedent or that the account should have been limited to that sum; and he contends that the matters alleged are res judicata.

Attached to the complaint was a copy of the condition of plaintiff's bond, which shows that liability is limited to moneys which came into the hands of Jaynes as administrator; copy of a petition of the administrator filed April 24, 1942, stating that he had collected rents and profits from decedent's real estate amounting to \$4,166.43 up to the appointment of the receiver; copy of the amended final account before recasting which shows among disbursements many items of expense in connection with the real estate; Mitchell's objections to that account; copy of the Circuit Court order sustaining some of the objections, overruling others and ordering the recasting; copy of the recast account showing the reduction of disbursements and the balance in the administrator's

mistake, collusion or fraud; that plaintiff relied upon the advice of administrator's counsel that decedent's estate was closed June 5, 1943; that it had no knowledge of the falsity of that advice until Mitchell's demand upon it June 25, 1947; and that thereupon it investigated and learned the facts too late to appear in the proceedings affecting the estate.

Jaynes admitted in his answer that the Probate and Circuit Courts were without jurisdiction to pass on the income from the real estate; that the allegations with respect to the false advice on the closing of the estate were true; and that, as administrator, the only proper items of account are those other than the income from the real estate. Mitchell denied that any items were improper or were included by mistake, collusion or fraud; that the Probate and Circuit Courts lacked jurisdiction; that \$1,043.78 was the only personal property left by decedent or that the account should have been limited to that sum; and he contends that the estate alleged are not includable.

Attached to the complaint as a copy of the condition of plaintiff's bond, which shows that liability is limited to moneys which came into the hands of Jaynes as administrator; copy of a petition of the administrator filed April 24, 1947, stating that he had collected rents and profits from decedent's real estate amounting to \$4,166.45 up to the appointment of the receiver; copy of the amended final account before receiving which shows among disbursements many items of expense in connection with the real estate; Mitchell's objections to that account; copy of the Circuit Court order sustaining some of the objections, overruling others and ordering the receiving; copy of the record account showing the reduction of disbursements and the balance in the administrator's

hands; and the order approving the account as recast and ordering distribution in accordance with the table of heirship in the Probate Court.

November 1, 1943 Mitchell moved to strike the complaint as insufficient and as barred by the judgments which it sought to attack. This motion was overruled May 18, 1944. October 26, 1944, plaintiff presented evidence in support of its complaint. October 30, 1944, Mitchell moved to strike the complaint, claiming it was an original bill, in the nature of a bill of review relying on new matter requiring extrinsic evidence and, leave to file the same not having been given. The trial court sustained the motion November 17th. Subsequently, on November 20, that order was vacated and an order entered which recited the taking of the evidence and Mitchell's motion. It ordered the complaint stricken and the suit dismissed.

The instant complaint filed in the Circuit Court seeks to set aside as void the former decree of that court on the appeal from the Probate Court. The former decree is attacked as exceeding the jurisdiction of the Circuit Court. Plaintiff contends that the Probate Court exceeded its jurisdiction in passing upon real estate rentals and that the Circuit Court's jurisdiction in the matter on appeal was limited to that of the Probate Court. Mitchell does not dispute this contention. He says that plaintiff's complaint is a bill in the nature of a Bill of Review based on matters outside the record, could not be filed without leave of court and was properly dismissed on his motion.

In the earliest Illinois case on this subject, Griega v. Gear, 3 Ill. (Gilman) 3, a distinction is drawn between Bills of Review and Original Bills in the Nature of Bills of Review. Bills

hand; and the order approving the account as correct and ordering distribution in accordance with the table of bequest in the Probate Court.

November 1, 1948 Mitchell moved to strike the complaint as insufficient and as barred by the judgments which it sought to attack. This motion was overruled May 18, 1944. October 26, 1944, plaintiff presented evidence in support of its complaint. October 30, 1944, Mitchell moved to strike the complaint, claiming it was an original bill, in the nature of a bill of review relating on new matter requiring extrinsic evidence and, leaves to file the same not having been given. The trial court sustained the motion November 17th. Subsequently, on November 20, that order was vacated and an order entered which recited the taking of the evidence and Mitchell's motion. It ordered the complaint stricken and the suit dismissed.

The instant complaint filed in the Circuit Court seeks to set aside as void the former decree of that court on the appeal from the Probate Court. The former decree is attacked as exceeding the jurisdiction of the Circuit Court. Plaintiff contends that the Probate Court exceeded its jurisdiction in passing upon real estate rentals and that the Circuit Court's jurisdiction in the matter on appeal was limited to that of the Probate Court. Mitchell does not dispute this contention. He says that plaintiff's complaint is a bill in the nature of a bill of review based on matters outside the record, could not be filed without leave of court and was properly dismissed on his motion.

In the earliest Illinois case on this subject, Wilson v. Wilson, 3 Ill. (Gilman) 2, a distinction is drawn between bills of review and original bills in the nature of bills of review. While

of Review were divided into two classes, those for error of law apparent on the face of the decree and those for newly discovered evidence. Original Bills in the Nature of Bills of Review were said to be those for fraud in fact or fraud in law. The court held that Bills of Review for error apparent and Original Bills in Nature of Bills of Review could be filed as of right without leave of court, whereas, allowing the filing of a Bill of Review for newly discovered evidence rested in the sound discretion of the trial court. The descriptive terms for these two classes of bills are in later cases used interchangeably. Knobloch v. Mueller, 123 Ill. 554; Harrigan v. County of Peoria, 262 Ill. 36; and People v. Sterling, 357 Ill. 354.

There is nothing in the former decree or the Circuit Court record of that controversy which shows that the court passed upon the real estate rentals. The only document from which that fact can be said to be seen is a petition of the administrator filed in the Probate Court April 24, 1942. A copy of this petition was attached to the complaint in the instant case. To show the jurisdictional defect therefore plaintiff must go outside the record. The complaint is accordingly a Bill of Review for newly discovered evidence. Griggs v. Gear; Anderson v. Anderson, 349 Ill. 259.

The complaint in addition to the jurisdictional ground charged fraud. A pleading may partake of characteristics of both a Bill of Review and an Original Bill in the Nature of Review. Griggs v. Gear. One of these, standing alone, could be filed as of right and the other depending upon the trial court's discretion. Courts of Equity do not favor Bills of Review, however, especially those for newly discovered evidence, 19 Am. Jur. 291, and, con-

of review were divided into two classes, those for error of law and those for error of fact or fraud in law. The court held that bills of review for error of law and Original Bills in the nature of bills of review were to be those for fraud in fact or fraud in law. The court held that bills of review for error of fact or fraud in law in nature of bills of review could be filed as of right without leave of court, whereas, allowing the filing of a bill of review for newly discovered evidence rested in the sound discretion of the trial court. The descriptive terms for these two classes of bills are in later cases used interchangeably. Knapp v. Knapp, 123 Ill. 354; Harwin v. County of Cook, 232 Ill. 36; and People v. Harwin, 327 Ill. 384.

There is nothing in the former cases or the Circuit Court record of that controversy which shows that the court passed upon the bill of review. The only document from which that fact can be said to be seen is a petition of the administrator filed in the Probate Court April 24, 1941. A copy of this petition was attached to the complaint in the instant case. To show the jurisdictional defect therefore plaintiff went to outside the record. The complaint is accordingly a bill of review for newly discovered evidence. Griggs v. Griggs, Anderson v. Anderson, 340 Ill. 279.

The complaint in addition to the jurisdictional ground charged fraud. A pleading may state of characteristics of both a bill of review and an Original bill in the nature of review. Griggs v. Griggs. One of these, standing alone, could be filed as of right and the other depending upon the trial court's discretion. Courts of equity do not favor bills of review, however, especially those for newly discovered evidence, 19 Am. Jur. 2d, and, con-

sequently, leave to file the instant complaint rested in the court's discretion. Harrigan v. County of Peoria, 262 Ill. 36.

Mitchell's motion to strike the complaint having been filed without leave was not made until after he answered and all the evidence in the case was taken. The trial court had the power to entertain the proceeding. The only question was whether it would entertain the proceeding in a sound exercise of its discretion. We think that Mitchell waived his right to have the motion considered, by answering and participating in the trial. He relies on Ullrich v. Ullrich, 299 Ill. App. 460, to preclude a finding that he has waived his right. It is true the motion there was made after defendant had answered. The answer was withdrawn, however, before the motion was made and no evidence was taken.

The evidence in the instant case clearly shows that the Receipts in the administrator's final account included real estate rentals. These rentals were taken into consideration by the Circuit Court on the appeal in arriving at "the balance" remaining in the administrator's hands for distribution. The court had no jurisdiction to pass upon the rents. Green v. Massie, 13 Ill. 363; Foltz v. Prouse, 17 Ill. 487; Haynes v. McDonald, 158 Ill. App. 294; Grotefendt v. Schlaeppli-Siever, et al., 213 Ill. App. 436. The case of Goespner v. Leitzetmann, 98 Ill. 409, cited by defendant does not state a different rule.

The decree of the Circuit Court on the appeal from the Probate Court is void in so far as it passed upon the real estate rentals. The entire decree, however, is not void since the void part is separable from the valid. People v. Seelye, 146 Ill. 189, 224.

Since we hold that that part of the decree which passed on the rent was void, we need not consider defendant's contentions that at most the Circuit Court decree was merely erroneous and could still be res judicata, and that the judgment against the

recently, leave to file the instant complaint rested in the court's discretion. Harrison v. County of Lewis, 265 Ill. 38.

Mitchell's motion to strike the complaint having been filed without leave was not made until after he answered and all the evidence in the case was taken. The trial court had the power to entertain the proceeding. The only question was whether it would enter in the proceeding in a sound exercise of its discretion. We think that Mitchell waived his right to have the motion considered, by answering and participating in the trial. He relies on Ulrich v. Ulrich, 229 Ill. App. 450, to preclude a finding that he has waived his right. It is true the motion there was made after defendant had answered. The answer was withdrawn, however, before the motion was made and no evidence was taken.

The evidence in the instant case clearly shows that the receipts in the administrator's final account included real estate rentals. These rentals were taken into consideration by the Circuit Court on the appeal in arriving at "the balance" remaining in the administrator's hands for distribution. The court had no jurisdiction to pass upon the rents. Green v. Hauler, 13 Ill. 387; Feltz v. Frouse, 17 Ill. 487; Wagner v. McDonald, 123 Ill. App. 304; Gratzland v. Schlusberg-Lever et al, 215 Ill. App. 456. The case of Wagner v. Leitzmann, 98 Ill. 409, cited by defendant does not state a different rule.

The decree of the Circuit Court on the appeal from the Probate Court is void in so far as it passed upon the real estate rentals. The entire decree, however, is not void since the void part is separable from the valid. People v. Geeve, 143 Ill. 128, 324.

Since we hold that part of the decree which passed on the rents was void, we need not consider defendant's contention that at most the Circuit Court decree was merely erroneous and could still be rescindere, and that the judgment against the

administrator is binding against plaintiff. We need not consider whether fraud was shown. The lack of jurisdiction is sufficient to avoid the decree to the extent noted.

Defendant argues that the administrator was chargeable with 10 per cent interest per year after the expiration of two years following the issuance of letters of administration under Chap. 3, Par. 462, Ill. Rev. Stats. This paragraph does not apply unless there is personalty distributable and, moreover it is clear that for most of the period during which the estate was open, Mitchell's litigation with respect thereto was pending.

Because of the lack of jurisdiction in the Circuit Court, on the appeal from the Probate Court, shown by the evidence in the instant case, the trial court committed error in dismissing plaintiff's suit. The decree of the Circuit Court in the Estate of Hattie Nesbit appeal should be nullified in so far as it purports to make any findings or orders with respect to income from, or disbursements in connection with, the decedent's real estate.

For the reasons given hereinabove the decree appealed from is reversed and the cause is remanded with directions to the trial court to recast the administrator's account in accordance with the principles herein announced and to enter a decree accordingly.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

LEWE AND BURKE, JJ. CONCUR.

administrator is binding against plaintiff. We need not consider whether fraud was shown. The lack of jurisdiction is sufficient to avoid the decree to the extent noted.

Defendant argues that the administrator was charged with 10 per cent interest per year after the expiration of two years following the issuance of letters of administration under Chap. 5, Art. 484, Ill. Rev. Stat. This paragraph does not apply unless there is personal liability and, moreover it is clear that for most of the period during which the estate was open, Mitchell's litigation with respect thereto was pending.

Because of the lack of jurisdiction in the Circuit Court, on the appeal from the Probate Court, shown by the evidence in the instant case, the trial court committed error in dismissing plaintiff's suit. The decree of the Circuit Court in the estate of Mattie Nesbit appeal should be nullified in so far as it purports to make any findings or orders with respect to income from, or distributions in connection with, the decedent's real estate.

For the reasons given heretofore the decree appealed from is reversed and the cause is remanded with directions to the trial court to reset the administrator's account in accordance with the principles herein announced and to enter a decree accordingly.

REMANDED WITH DIRECTIONS.
JAMES AND BURKE, JJ. CONCUR.

43540

HENRY FARMER,

Appellant,

v.

CIVIL SERVICE COMMISSION OF THE
CITY OF CHICAGO and WALTER L.
GREGORY, JAMES B. GASHIN and
WILLIAM F. CLARKE, as Civil Service
Commissioners of the City of Chicago,

Appellees.

329 I.A. 326

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

A 402

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On August 9, 1944 Henry Farmer filed a complaint for a writ of certiorari in the Superior Court of Cook County to review the proceedings of the Civil Service Commission of the City of Chicago and its order discharging him from his position as a patrolman in the Department of Police in the classified service of the City of Chicago. A motion by defendants to strike the petition and to dismiss the complaint was denied and the writ issued. Defendants filed a return. A motion was filed by plaintiff to strike from the return the purported findings of the Commission, on the ground that the findings were written up after the writ of certiorari had issued. Defendants' motion to quash the writ of certiorari was sustained and plaintiff's motion to quash the record was denied. Plaintiff appeals.

The return states that on February 9, 1944 charges were preferred against plaintiff by the Commissioner of Police, together with specifications of particular acts of conduct constituting the violations charged; that due notice was given to plaintiff; that at a hearing witnesses testified; that plaintiff appeared and was represented by counsel; that the case was taken

3221.A.226

43540

HENRY FARMER,

Appellant,

v.

CIVIL SERVICE COMMISSION OF THE
CITY OF CHICAGO and BOARD OF
CIVIL SERVICE COMMISSIONERS
WILLIAM P. CLARK, as Civil Service
Commissioners of the City of Chicago,

Appellees.

CHICAGO COURTS

CHICAGO COURTS

A

THE JUSTICE COURT DELIVERED THE ORDER OF THE COURT.

On August 2, 1944 Henry Farmer filed a complaint for

a writ of certiorari in the Superior Court of Cook County to

review the proceedings of the Civil Service Commission of the

City of Chicago and its order discharging him from his position

as a patrolman in the Department of Police in the classified

service of the City of Chicago. A motion by defendants to strike

the petition and to dismiss the complaint was denied and the

writ issued. Defendants filed a return. A motion was filed by

plaintiff to strike from the return the purported findings of

the Commission, on the ground that the findings were written up

after the writ of certiorari had issued. Defendants' motion to

quash the writ of certiorari was sustained and plaintiff's motion

to quash the record was denied. Plaintiff appeals.

The return states that on February 9, 1944 charges

were returned against plaintiff by the Commissioner of Police,

together with recommendations of particular acts of conduct con-

stituting the violations charged; that due notice was given to

plaintiff; that at a hearing witnesses testified; that plaintiff

appeared and was represented by counsel; that the case was taken

under advisement on March 1, 1944; that he was found guilty and ordered to be discharged on March 8, 1944; and that on March 8, 1944 a letter was sent by the Secretary of the Commission to the Commissioner of Police stating that plaintiff on that date was found guilty of conduct unbecoming a police officer and ordered discharged from the service.

On February 19, 1945 plaintiff's attorney filed an affidavit, stating that he "personally inspected the files and records in the matter of Henry Farmer, a patrolman in the Civil Service Commission of the City of Chicago, one of the respondents herein, No. G 21535, after the oral order of discharge was made by the Commission and after the written order was entered on March 8, 1944; that the only finding of the Commission that was of record was a finding petitioner guilty of conduct unbecoming a police officer of the City of Chicago, and the only order entered therein was that said petitioner was ordered discharged from the police force of the City of Chicago; that there was no finding of any facts whatsoever. Affiant further states that he again inspected said record in the office of said Civil Service Commission in the month of August, 1944, immediately prior to filing his petition for certiorari on the 9th day of August, 1944, and that no further finding by said Civil Service Commission had been made or entered of record; that no facts in support of said order of discharge were found by said Commission or entered of record at that time; that after the petition of certiorari was filed and pending in this court in the month of October, 1944, immediately prior to the 9th day of October, when affiant appeared in court to have the cause set for disposition, affiant again inspected the records and files of this cause in the office of the Civil Service Commission of Chicago, and that the purported findings of fact set up in the return of respondents were not then in the record or a part of the record. Affiant further states that said Commission had no

under advisement on March 1, 1944; that he was found guilty and ordered to be discharged on March 8, 1944; and that on March 8, 1944 a letter was sent by the Secretary of the Commission to the Commissioner of Police stating that plaintiff on that date was found guilty of conduct unbecoming a police officer and ordered discharged from the service.

On February 19, 1945 plaintiff's attorney filed an affidavit, stating that he personally inspected the files and records in the matter of Henry Turner, a patrolman in the Civil Service Commission of the City of Chicago, one of the respondents herein, No. 8 21835, after the oral order of discharge was made by the Commission and after the written order was entered on March 8, 1944; that the only finding of the Commission that was of record was a finding petitioner guilty of conduct unbecoming a police officer of the City of Chicago, and the only order entered therein was that said petitioner was ordered discharged from the police force of the City of Chicago; that there was no finding of any facts whatsoever. Plaintiff further states that he again inspected said record in the office of said Civil Service Commission in the month of August, 1944, immediately prior to filing his petition for certiorari on the 25th day of August, 1944, and that no further finding by said Civil Service Commission had been made or entered of record; that no facts in support of said order of discharge were found by said Commission or entered of record at that time; that after the petition of certiorari was filed and pending in this court in the month of October, 1944, immediately prior to the 25th day of October, when plaintiff appeared in court to have the cause set for disposition, plaintiff again inspected the records and files of this cause in the office of the Civil Service Commission of Chicago, and that the purported findings of fact set up in the return of respondents were not then in the record or a part of the record. Plaintiff further states that said Commission had no

jurisdiction to make any findings of facts in support of its order after petition for certiorari had been filed in this court, and especially after certiorari had issued herein; that said alleged findings of fact are a nullity and of no force and effect, for the reason that said Commission had no jurisdiction whatsoever to make the same, and they should be stricken from the return and from the records and files in this cause." The attorney for plaintiff also filed a written motion to strike from the return the purported finding of fact of the Commission "because the Civil Service Commission had no jurisdiction to make any findings of fact after the writ of certiorari had issued therein."

The findings of fact set up in the return were not in existence until after the writ of certiorari issued. As a matter of fact seven months elapsed between the date of discharge and the preparation and filing of the findings. Defendants assert that there is no requirement in the law that the Commission write up its findings of fact before ordered to do so in response to a writ of certiorari. We are of the opinion that under the provisions of Sec. 12 of the Civil Service Act and Sec. 4 of Rule 6 of the Civil Service Rules, adopted by the Commission, it is enuambent upon the Commission to make and file its finding and decision and certify such finding and decision to the appointing officer. This procedure contemplates that the finding and decision required by law must be complete before it is certified to the appointing officer. The only finding of the Commission that was of record prior to the filing of the certiorari case was that plaintiff was guilty of conduct unbecoming a police officer. There was no finding of fact. The finding that plaintiff was guilty of conduct unbecoming a police officer was a mere conclusion and a

jurisdiction to make any findings of fact in support of its order after action for certiorari had been filed in this court, and especially after certiorari had been denied; that said findings of fact are a nullity and of no force and effect, for the reason that said Commission had no jurisdiction whatsoever to make the same, and they should be stricken from the return and from the records and files in this case. The attorney for plaintiff also filed a written motion to strike from the return the purported finding of fact of the Commission "to wit: as the Civil Service Commission had no jurisdiction to make any findings of fact after the writ of certiorari had been thereon."

The findings of fact set up in the return were not in existence until after the writ of certiorari issued, as a matter of fact seven months elapsed between the date of discharge and the preparation and filing of the findings. Defendants assert that there is no precedent in the law that the Commission write up its findings of fact before ordered to do so in response to a writ of certiorari. We are of the opinion that under the provisions of sec. 15 of the Civil Service Act and sec. 4 of Rule 6 of the Civil Service Rules, adopted by the Commission, it is incumbent upon the Commission to make and file its findings and decision and certify such finding and decision to the appointing officer. This procedure contemplates that the finding and decision returned by law must be complete before it is certified to the appointing officer. The only finding of the Commission that was of record prior to the filing of the certiorari case was that plaintiff was guilty of conduct constituting a police officer. There was no finding of fact. The finding that plaintiff was guilty of conduct constituting a police officer was a mere conclusion and a

nullity. Funkhouser v. Coffin, 301 Ill. 257. A civil service employee charged with violation of duty, as a matter of elemental justice, should not be discharged without knowing the facts on which his discharge is based. The record should be complete before he is discharged. There is no warrant in law for making up the record to support the discharge after a person has been discharged. Such a practice cannot be countenanced.

In the instant case defendants should have been required to file a supplemental return in order to show the true record. However, in the trial court and here defendants admit that the findings were written up and entered after the writ of certiorari issued. In cases Nos. 43402, 43403, 43411, 43412, 43414 and 43324, (in which an opinion is filed today) plaintiffs followed the proper practice in requiring the filing of a true return. In view of the admission in defendants' brief, we will treat the affidavit filed by the attorney for plaintiff as a part of the record.

The court should have quashed the return. Therefore, the judgment of the Superior Court of Cook County is reversed and the cause remanded with directions to enter a judgment quashing the return.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

KILEY, P.J. AND LEWE, J. CONCUR.

nullity. Lukhomsky v. Loflin, 301 Ill. 287. A civil service
 employee charged with violation of duty, as a matter of elemental
 justice, should not be discharged without knowing the facts on
 which his discharge is based. The record should be complete
 before he is discharged. There is no warrant in law for making
 up the record to support the discharge after a person has been
 discharged. Such a practice cannot be countenanced.
 In the instant case defendants should have been required
 to file a supplemental return in order to show the true record.
 However, in the trial court and here defendants admit that the
 findings were written up and entered after the writ of certiorari
 issued. In cases Nos. 43-02, 43-03, 43-04, 43-05, 43-06 and
 43-07, (in which an opinion is filed today) plaintiffs followed
 the proper practice in receiving the filing of a true return.
 In view of the admission in defendants' brief, we will treat
 the affidavit filed by the attorney for plaintiff as a part of
 the record.
 The court should have quashed the return. Therefore,
 the judgment of the Superior Court of Cook County is reversed
 and the cause remanded with directions to enter a judgment
 quashing the return.

JUDGMENT REVERSED AND CAUSE
 REMANDED WITH DIRECTIONS.

KILBY, P. J. AND LEWIS, J. CONCUR.

43280

329 I.A. 327¹

JOHN T. O'CONNELL, et al.,

APPEAL FROM

Appellees,

SUPERIOR COURT

v.

CALIFORNIA AVENUE BUILDING
CORPORATION,

COOK COUNTY.

Appellant.

404

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a proceeding instituted under section 73 of the Corporation Act by dissenting owners of 99 shares in defendant corporation to determine the fair value of the shares. On appeal from the Probate Court the cause was tried de novo by the court without a jury and judgment was rendered in favor of plaintiffs in the sum of \$6,872.25, from which defendant appeals.

Defendant, a domestic corporation, owned a building in the City of Chicago consisting of 18 apartments and 4 stores. This was its principal asset. There were issued by the corporation at the time of its organization in 1937, 831 shares of common stock of no par value, of which plaintiffs own 99 shares.

The gist of the petition is that defendant notified plaintiffs and other shareholders that it had received an offer for sale of the building of \$42,500; that the sale had been approved by a vote of two-thirds of the shareholders; that in accordance with the provisions of the statute plaintiffs within 20 days after the vote was taken made a written demand on defendant for payment to plaintiffs of the fair value of their shares as of June 17, 1943, the day on which the vote was taken, and that plaintiffs and defendant did not agree on the fair value of plaintiffs' shares. The petition concludes with a prayer that the court find and determine the fair value of the shares and enter judgment against the defendant.

3221.A.322

42820

JOHN T. O'CONNELL, et al.,	Plaintiffs,
	v.
CALIFORNIA AVIATION BUILDING CORPORATION,	Defendant.

MR. JUSTICE ROSS delivered the opinion of the court.

This is a proceeding instituted under section 73 of

the corporation act by dissatisfied owners of 82 shares in defendant corporation to determine the fair value of the shares. On appeal from the referee's report the case was tried de novo by the court without a jury and judgment was rendered in favor of plaintiff in the sum of \$,872.25, from which defendant appeals.

Defendant, a domestic corporation, owned a building in the city of Chicago consisting of 18 apartments and a store. This was its principal asset. There were issued by the corporation at the time of its organization in 1917, 821 shares of common stock of no par value, of which plaintiff own 82 shares. The gist of the petition is that defendant notified plaintiff and other shareholders that it had received an offer for sale of the building of \$42,000; that the sale had been approved by a vote of two-thirds of the shareholders; that in accordance with the provisions of the statute plaintiff within 60 days after the vote was taken made a written demand on defendant for payment to plaintiff of the fair value of their shares as of June 17, 1943, the day on which the vote was taken, and that plaintiff and defendant did not agree on the fair value of plaintiff's shares. The petition concludes with a prayer that the court find and determine the fair value of the shares and enter judgment against the defendant.

In its answer defendant avers in substance that the sale of the property of the corporation was consummated; that the proceeds are ready for distribution to the shareholders; that sufficient moneys will be retained by defendant to abide any judgment which may be rendered in favor of plaintiffs; that there is nothing left to be done except to value the shares owned by plaintiffs, and that the cause should be transferred to the law side for trial in accordance with the statutes relating to "eminent domain."

The trial court found that the fair cash market value of the building was \$60,000 and that fair value of each share owned by the plaintiffs was \$65.

Defendant has challenged the trial court's findings on the grounds that section 73 of the Corporation Act has no application to the instant case, and that the findings with respect to the value of the building and the shares are not supported by the evidence.

As to defendant's first contention it should be noted that defendant averred in its answer that nothing was left to be done except to value the shares owned by plaintiffs and asked that the cause be tried in accordance with the statutes relating to eminent domain. In accordance with the prayer of defendant's answer the cause was transferred to the law side and the issues raised therein were determined by the court. The question of the court's jurisdiction of the subject-matter was not raised in the trial court. Since defendant failed to interpose this legal objection before the cause was presented and heard on the merits, it comes too late. (Ahlenius v. Bunn & Humphreys, 358 Ill. 155, 166.) The law is well established that a person cannot proceed on one theory in the trial court and on another in a court of review.

In its answer defendant says in substance that the sale of the property of the corporation was consummated; that the proceeds are ready for distribution to the shareholders; that sufficient moneys will be retained by defendant to "hide my judgment which may be rendered in favor of plaintiffs; that there is nothing left to be done except to value the shares owned by plaintiffs, and that the cause should be transferred to the law side for trial in accordance with the statute relating to "eminent domain."

The trial court found that the fair cash market value of the building was \$50,000 and that fair value of each share owned by the plaintiffs was \$5. Defendant has challenged the trial court's findings on the grounds that section 75 of the Corporation Act has no application to the instant case, and that the findings with respect to the value of the building and the shares are not supported by the evidence.

As to defendant's first objection it should be noted that defendant averred in its answer that nothing was left to be done except to value the shares owned by plaintiffs and asked that the cause be tried in accordance with the statute relating to eminent domain. In accordance with the prayer of defendant's answer the cause was transferred to the law side and the issues raised therein were determined by the court. The question of the court's jurisdiction of the subject-matter was not raised in the trial court. Since defendant failed to interpose this legal objection before the cause was presented and heard on the merits, it came too late. (Appel v. John A. Hughes, 222 Ill. 155, 156.) The law is well established that a person cannot proceed on one theory in the trial court and on another in a court of review.

(Off v. Exposition Coaster, 336 Ill. 100, 108; Chicago T. & Tr. Co. v. DeLassaux, 336 Ill. 522, 529.) Inasmuch as the case was tried on the theory of eminent domain at the behest of the defendant it cannot complain.

It is next urged by defendant that there is no competent evidence to support the finding of the court as to the valuation of defendant's building nor is there any evidence as to the fair cash value of the stock. The record discloses that six witnesses testified in behalf of the defendant that the fair cash market value of the premises as of the day prior to June 17, 1943 was \$42,000. Plaintiffs introduced the testimony of but one witness, who testified that the building, on June 16, 1943, was worth \$60,000.

After the proofs were closed on June 19, 1944, the cause was continued from time to time on the court's motion for the purpose of examining the law and considering the evidence. On June 29, 1944 (Rec. 379), addressing one of the plaintiffs, the trial judge stated, "So far, of course, the only proof that you people have on your side is the one [witness]. To fix the market value on that property don't you think I ought to have more evidence as to the market value? I haven't got very good evidence of market value at that time. I don't think that either side has substantially fixed by evidence the value of that property. (Rec. 386) * * * What I should get is proof of the value of the building at that time. I haven't much proof on it. (Rec. 387 * * * I have very little confidence in any real estate appraiser, whether they are from the Chicago Real Estate Board or somewhere else. Nobody gives me any proof either side of what the fair cash value of the property is." At the subsequent hearing on July 6, 1944 the court made the following statement (Rec. 390: "In this matter I went over to the property and I am of the opinion that it is

(Off v. Exposition Board, 330 Ill. 100, 108; Chicago T. & P. Co.

v. Chicago, 330 Ill. 321, 329.) Inasmuch as the case was tried

on the theory of eminent domain at the behest of the defendant it cannot complain.

It is next urged by defendant that there is no competent

evidence to support the finding of the court as to the valuation of defendant's building nor is there any evidence as to the fair cash value of the stock. The record discloses that six witnesses

testified in behalf of the defendant that the fair cash market value of the premises as of the day prior to June 14, 1943 was \$4,000. Plaintiff introduced the testimony of but one witness,

who testified that the building, on June 14, 1942, was worth \$8,000.

After the proofs were closed on June 18, 1944, the

cause was continued from time to time on the court's motion for the purpose of examining the law and considering the evidence. On

June 20, 1944 (Dec. 373), addressing one of the plaintiffs, the

trial judge stated, "as far, of course, as the only proof that you

people have on your side is the one [witness], to fix the market

value on that property don't you think I ought to have more evidence

as to the market value? I haven't got very good evidence of

market value at that time. I don't think that either side has

substantially fixed by evidence the value of that property. (Dec. 382)

" * * * But I should not be fixed of the value of the building

at that time. I haven't much proof on it. (Dec. 387 * * * I have

very little confidence in any real estate appraiser, whether they

are from the Chicago Real Estate Board or elsewhere else. Nobody

gives me any proof either side of what the fair cash value of

the property is." At the subsequent hearing on July 8, 1944 the

court made the following statement (Dec. 390: "In this matter

I went over to the property and I am of the opinion that it is

worth more than \$42,000, and I will have to therefore make a finding, only with one exception, that is that the property must have been worth at the time \$60,000."

From a reading of the record it is apparent that the trial judge disregarded all the testimony bearing on the value of defendant's building and based his judgment solely upon his own view of the premises. We think the court erred in doing so. In City of Chicago v. Koff, 341 Ill. 520, 525, the court held that view by the jury is in the nature of evidence and may be considered by the jury in making up their verdict. To the same effect see South Park Commissioners v. Livingston, 344 Ill. 368, 374; Illinois-Iowa Power Co. v. Guest, 370 Ill. 160, 165; Forest Preserve Dist. v. Eekhoff, 372 Ill. 396. In City of Rockford v. Mower, 259 Ill. 604, 102 N. E. 1032, the court said at page 612; "That the jury had no right to disregard the testimony of the witnesses and base their verdict upon their view of the premises is well established in this State." To the same effect see The East St. Louis, Columbia and Waterloo Ry. v. The Illinois State Trust Co., Trustee, 248 Ill. 559, at p. 565.

In a great metropolitan area the value of land and of its improvements are not a matter of common knowledge; innumerable factors affect their value. Under modern conditions years of study and experience are necessary for a proper appraisal of them,

In the instant proceeding the judge acted as the counterpart of a jury and therefore his position is not different from that of a jury which had viewed the premises but ignored the testimony of competent expert witnesses.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

KILEY, D.J. AND BURKE, J. CONCUR.

worth more than \$2,000, and I will have to therefore make a finding, only with one exception, that is that the property must have been worth at the time \$20,000."

From a reading of the record it is apparent that the

trial judge disregarded all the testimony bearing on the value

of defendant's building and based his judgment solely upon his

own view of the premises. We think the court erred in doing so.

In City of Chicago v. Kelly, 241 Ill. 526, 532, the court held that

view by the jury is in the nature of evidence and may be considered

by the jury in making up their verdict. To the same effect see

South Park Commissioners v. Livingston, 244 Ill. 328, 334; Illinois

Iron Works Co. v. Clark, 270 Ill. 130, 135; Forest Preserve Dist.

v. Kerkhoff, 272 Ill. 326. In City of Rockford v. Board, 207 Ill.

204, 104 W. R. 1233, the court said at page 819; "That the jury

had no right to disregard the testimony of the witnesses and

base their verdict upon their view of the premises is well established

in this State. To the same effect see The East St. Louis,

Columbia and Atlantic Ry. v. The Illinois State Trust Co. Trustee,

248 Ill. 503, 10 W. R. 563.

In a recent opinion we have stated the value of land and of

its improvements are not a matter of common knowledge; immovable

property affects their value. When, under conditions years of study

and experience are necessary for a proper appraisal of them,

in the instant proceeding, the judge acted as the counter-

part of a jury and therefore his action is not different from

that of a jury which has viewed the premises but ignored the

testimony of competent expert witnesses.

For the reasons stated, the judgment is reversed and the

cause remanded for a new trial.

REVEREND JAMES HENNINGSEN FOR NEW TRIAL.

REVEREND JAMES HENNINGSEN FOR NEW TRIAL.

REVEREND JAMES HENNINGSEN FOR NEW TRIAL.

REVEREND JAMES HENNINGSEN FOR NEW TRIAL.

43302

KATHERIN REHNELOOM,

Appellee,

v.

CITY OF BERWYN, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

329 I.A. 327²

405

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse a judgment for \$7,500 entered for plaintiff on the verdict of a jury in an action for damages for personal injuries resulting from a fall on a sidewalk.

On February 12, 1943, while walking in an easterly direction on the south walk of Windsor Avenue in the City of Berwyn, plaintiff, who was seventy-seven years of age, fell and fractured her left femur. In the immediate vicinity of the south side of Windsor Avenue, where it is alleged plaintiff fell, are retail stores. On the north side the Burlington Railroad right-of-way runs parallel with Windsor Avenue. The first intersecting street west of the alleged scene of the accident is Oak Park Avenue which extends north and south. About 1:00 o'clock p.m. on the day in question, plaintiff accompanied by her granddaughter nine and half years of age, walked south on Oak Park Avenue across the Burlington Railroad tracks to the south walk of Windsor Avenue and then turned east. As she and her granddaughter were walking near premises known as 6740 Windsor Avenue plaintiff fell. At the southeast corner of Windsor Avenue and Oak Park Avenue, Hamm Brothers grocery occupied two lots facing Windsor Avenue. Next door to the east is a store occupied by Vetter's bakery where plaintiff alleges she fell. Beyond the bakery to the east is Forsell's fish market. The cement sidewalk in front

KATHLEEN KENNEDY

Appellee,

CITY OF NEWYORK, a corporation,

Appellant.

SUPREME COURT

CITY COUNTY

MR. JUSTICE LEE delivered the opinion of the court.
 By this appeal defendant seeks to reverse a judgment
 for \$7,500 entered for plaintiff on the verdict of a jury in an
 action for damages for personal injuries resulting from a fall
 on a sidewalk.

On February 12, 1945, while walking in an easterly

direction on the south walk of Madison Avenue in the City of
 New York, plaintiff, who was seventy-seven years of age, fell and
 fractured her left femur. In the immediate vicinity of the south
 side of Madison Avenue, where it is alleged plaintiff fell, are
 retail stores. On the north side the Washington Railroad right-
 of-way runs parallel with Madison Avenue. The first interesting
 street west of the alleged scene of the accident is Oak Park
 Avenue which extends north and south. About 1:00 o'clock p.m.
 on the day in question, plaintiff accompanied by her granddaughter
 nine and half years of age, walked south on Oak Park Avenue
 across the Washington Railroad tracks to the south walk of
 Madison Avenue and then turned east. As she and her granddaughter
 were walking near premises known as 8740 Madison Avenue plaintiff
 fell. At the southeast corner of Madison Avenue and Oak Park
 Avenue, Harn Brothers Grocery occupied two lots facing Madison
 Avenue. Next door to the east is a store occupied by Jetter's
 Bakery where plaintiff slipped and fell. Beyond the Bakery to
 the east is Correll's fish market. The cement sidewalk in front

of the stores was approximately 14 feet wide and divided into 7-foot squares. It was smooth and even except the north half of the walk in front of Vetter's bakery. On the day of the accident the sidewalk was covered with ice and snow, which was a general condition prevailing all over the City of Berwyn. There was evidence that the snow had been cleared from the south half of the walk in front of the stores on Windsor Avenue and that the north half of the walk, including that part in front of Vetter's bakery, was covered with snow about one foot in depth.

The gist of the complaint is that the sidewalk in front of the premises known as 6740 Windsor Avenue (Vetter's bakery) was in a broken, uneven, unrepaired and dangerous condition and had been so broken and in disrepair for several years prior to February 12, 1943; that as a proximate result of negligence of the defendant in maintaining the sidewalk in a broken condition plaintiff fell and sustained a fracture of her left femur at the hip.

In its answer defendant avers that it did not in any manner contribute to alleged injuries of plaintiff and that if any injuries were sustained by her they were caused by plaintiff's contributory negligence.

Plaintiff and her granddaughter are the only occurrence witnesses. Plaintiff testified that the accident happened "just outside the bakery, just a step outside"; that the sidewalk was full of snow and at certain places it was deep; that as she was going into Vetter's bakery she "stepped down in the hole and went down"; that she could not see the hole because it was covered with snow; that two girls took her to a step and sat her down. On cross-examination plaintiff testified that she has resided in the United

of the stairs are approximately 14 feet wide and divided into 7-foot squares. It was smooth and even except the north half of the walk in front of Vetter's Bakery. On the day of the accident the sidewalk was covered with ice and snow, which was a general condition prevailing all over the City of New York. There was evidence that the snow had been cleared from the south half of the walk in front of the stores on 14th Street and that the north half of the walk, including that part in front of Vetter's Bakery, was covered with snow about one foot in depth.

The gist of the complaint is that the sidewalk in front of the premises known as 1740 Indiana Avenue (Vetter's Bakery) was in a broken, uneven, unlighted and dangerous condition and had been so broken and in disrepair for nearly 1 year prior to February 12, 1942; that as a proximate result of negligence of the defendant in maintaining the sidewalk in a broken condition Plaintiff fell and sustained a fracture of her left femur at the hip.

In its answer defendant states that it did not in any manner contribute to alleged injuries of Plaintiff and that if any injuries were sustained by her they were caused by Plaintiff's contributory negligence.

Plaintiff and her grandmother are the only witnesses. Plaintiff testified that the accident happened "just outside the Bakery, just a step outside"; that the sidewalk was full of snow and at every place it was deep; that as she was going into Vetter's Bakery she "stepped down in the hole and went down"; that the hole was not the hole because it was covered with snow; that the hole was a step and not down. On cross-examination Plaintiff testified that she had fallen in the United

States for ten years and that during this period she did no physical work and earned no money; that she had passed over the sidewalk in front of the stores many times in summer and winter and was familiar with its condition; that she had shopped at the bakery (Vetter's) and Hamm Brothers grocery store many times, and that "the hole was in front of the bakery."

Miriam Benton, plaintiff's granddaughter, testified substantially as follows: that she accompanied her grandmother across the Burlington tracks at Oak Park Avenue to the south walk of Windsor Avenue and then turned east; that "there was a little snow on the sidewalk; it was windy and the snow blew all over; I was walking alongside of grandma; we held hands; I held hands with her from the time we walked out until she tripped"; "she fell between the stoop and the curbstone in the middle where the stones are loose"; "I was walking so that I held her right hand."

Plaintiff's theory of the case as stated in her brief is that she stepped onto the portion of sidewalk which extended 7 feet in width and 35 feet long across the front of the premises occupied by the Vetter's bakery, at the place where the stones were loose. Defendant's theory is that plaintiff did not fall upon any portion of the sidewalk which was in a state of disrepair and that there is no evidence of loose stones or as to the location or size of the alleged "hole" into which plaintiff claims to have stepped.

Defendant's first contention is that the verdict and judgment are against the manifest weight of the evidence. It should be noted that plaintiff testified she fell "just a step outside" of Vetter's bakery and that she "stepped down in a hole." The testimony does not disclose the existence of any hole at this location but on the contrary the undisputed evidence is that there were no defects in the south half of the sidewalk where the plaintiff says she fell.

States for ten years and that during this period she did no physical work and earned no money; that she had passed over the sidewalk in front of the store many times in summer and winter and was familiar with its condition; that she had shopped at the bakery (Vetter's) and Hans Brothers Grocery store many times, and that "the hole was in front of the bakery."

Miriam Benton, Plaintiff's granddaughter, testified substantially as follows: that she accompanied her grandmother across the Burlington tracks at Oak Park Avenue to the south side of Windsor Avenue and then turned east; that "there was a little snow on the sidewalk; it was windy and the snow blew all over; I was walking alongside of grandma; we held hands; I held hands with her from the time we walked out until she tripped"; "she fell between the stop and the curbstone in the middle where the stones are loose"; "I was walking as that I held her right hand."

Plaintiff's theory of the case as stated in her brief is that she stepped onto the portion of sidewalk which extended 7 feet in width and 25 feet long across the front of the premises occupied by the Vetter's bakery, at the place where the stones were loose. Defendant's theory is that Plaintiff did not fall upon any portion of the sidewalk which was in a state of disrepair and that there is no evidence of loose stones or as to the location or size of the alleged "hole" into which Plaintiff claims to have stepped. Defendant's first contention is that the verdict and judgment are against the manifest weight of the evidence. It should be noted that Plaintiff testified she fell "just a step outside" of Vetter's bakery and that she "stepped down in a hole." The testimony does not disclose the existence of any hole at this location but on the contrary the undisputed evidence is that there were no defects in the south half of the sidewalk where the Plaintiff says she fell.

Plaintiff's other witness, Miriam Benton, testified that her grandmother fell "between the stoop and the curbstone in the middle where the stones are loose." Plaintiff also introduced certain photographs (Plf's Ex. 17-21) showing the sidewalk in front of the bakery and the stores to the west. Defendant urges that the photographic exhibits were improperly admitted in evidence. We think the trial court did not err in receiving them. Thura Forsell who operated a fish and delicatessen store in the premises adjoining the bakery on the east for the past thirteen years, testified that plaintiff's exhibits correctly represented the condition of the sidewalk in front of the bakery at the time of the accident except that they did not show the snow and ice. After plaintiff's exhibits were received in evidence defendant introduced exhibits 2 and 3 which are east and west views along the south walk of Windsor Avenue including the walk in front of Vetter's bakery.

In Terry v. City of Chicago, 320 Ill. App. 342-344, the court held that if the photograph correctly represented the condition of the sidewalk at the time of the accident it was admissible in evidence regardless of when it was taken. An examination of the photographs offered by plaintiff and defendant shows slight depressions in the outer or north half of the sidewalk in front of Vetter's bakery and what appears to be dirt, stones and small fragments of disintegrated concrete. The depth of the depressions and their dimensions or the size of the fragments cannot be determined from the pictures nor does the evidence show what they are.

The law is well established that a city is not an insurer against accidents, nor is it required to foresee and provide against every possible danger or accident that may occur, but it is only required to keep its sidewalks in a reasonably safe condition for the accommodation of the public use of them. (White v. City of Belleville, 284 Ill. App. 332, 339; McKinley v. City of Chicago,

4

[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

the courts held that if the defendant correctly represented the

in evidence suggestive of when it was taken. An examination of the photograph offered by Plaintiff and Defendant shows slight depression in the center on north half of the sidewalk in front of Defendant's bakery and that appears to be dirt, stones and small

The state of disintegrated morale, the basis of the depression

and will continue to be a part of the program.

10. The following information was obtained from the pictures on board the 77-28: How what they are.

The law is well established that a city is not a

INVESTMENT IN THE UNITED STATES OF AMERICA

11

is only required to keep the right side in a 100% condition

For the above information, I am enclosing herewith a copy of the report of the

INVESTIGATION OF THE CITY OF CHICAGO

299 Ill. App. 58, 68; Bleiman v. City of Chicago, 314 Ill. App. 471, 475.)

Henry Tupa, a Berwyn police officer who accompanied Officer Schwander in a squad car to the scene of the accident, testified in substance that on arrival there "we saw an elderly woman in a half-sitting and half-lying position resting there with a little child with her. I asked her what happened and she could not express herself in the American language. The little girl told me it was her grandmother, they were walking on the sidewalk, and that the grandmother slipped on the icy sidewalk and got hurt. She was lying on the stone sill west of the bakery, I would say ten or twelve feet west of the bakery. There was snow covering part of the sidewalk because we carried her across a pile or drift there on the north side of the sidewalk; there was only one lane open; there were two lanes of sidewalk but there was but one lane open, the other had snow on it, offhand I would say a foot deep in a drift."

Officer Schwander testified that on the day of the accident the sidewalk was very slippery; that "the little girl said the lady fell right where she was, right where we picked her up." "The depth of the snow was not measurable; it was just a haze of snow over the ice."

George Kral, a lieutenant of the Berwyn fire department, testified that his station was located a few doors east of Vetter's bakery; that "somebody said someone fell up the street west of the fire station and I ran out with two boys and we found a woman sitting on a step; I tried to talk to her to find out what was wrong. She had a little girl with her and I said 'What is wrong with your grandmother or mother?' And she says, 'She fell.' On that day part of the sidewalk was obstructed. The south half of the sidewalk

229 Ill. App. 58, 68; Blair v. City of Chicago, 114 Ill. App. 571.

(475.)

Henry Tupa, a Berwyn police officer who accompanied Officer Chandler in a patrol car to the scene of the accident, testified in substance that on arrival there "we saw an elderly woman in a half-sitting and half-lying position resting there with a little child with her. I asked her what happened and she could not express herself in the English language. The little girl told us it was her grandmother, they were walking on the sidewalk, and that the grandmother slipped on the icy sidewalk and got hurt. She was lying on the stone sill west of the bakery, I would say ten or twelve feet west of the bakery. There was snow covering part of the sidewalk because we carried her across a pile of drift there on the north side of the sidewalk; there was only one lane open; there were two lanes of sidewalk but there was but one lane open, the other had snow on it, and I would say a foot deep in a drift."

Officer Chandler testified that on the day of the accident the sidewalk was very slippery; that the little girl said the lady fell right where she was, right where we picked her up. "The depth of the snow was not measurable; it was just a mass of snow over the ice."

George Kral, a lieutenant of the Berwyn fire department, testified that his station was located a few blocks east of the bakery; that somebody told someone that the street west of the fire station and I ran out with two boys and we found a woman sitting on a step; I tried to talk to her to find out what was wrong. She had a little girl with her and I said 'that is wrong with your grandmother or mother?' And she says, 'she fell.' On that day part of the sidewalk was obstructed. The south half of the sidewalk

had a film of ice. The other side had snow piled on it. When I got there I found a woman and a little girl, no one else. I talked with the little girl; she started to cry. The place was west of the bakery about nine or ten feet." On cross-examination the witness testified, "My best memory is that the snow was about a foot high on the north half of the sidewalk. I walked that sidewalk every day and the snow was a foot deep on the broken-out portion of the sidewalk, that is the north end."

All of defendant's witnesses testified that only the south half was clear of snow and that the north half was not open to pedestrian use at the time of the occurrence. It appears to us that plaintiff's testimony is inconsistent with her theory, since there is no evidence that there was a hole just a step outside of the bakery or elsewhere in the vicinity. It follows therefore that the verdict of the jury must have been based solely upon the testimony of plaintiff's granddaughter and the photographs. Officer Schwander testified that plaintiff's granddaughter told him that plaintiff fell where the officers found her when they arrived at the scene of the accident. While the photographs show the general appearance of the sidewalk and unevenness of the surface on the north half, there is no testimony that the conditions appearing in the photographs are such as would render the sidewalk unsafe for pedestrian use. In Powers v. City of East St. Louis, 161 Ill. App. 163, at 167, the court said:

"to hold that this sidewalk as constructed was not reasonably safe within the meaning of the law would be virtually to hold that all walks should be smooth and level. This would require of cities perfection in the construction of their walks and would make them virtually insurers against all damages."

We recognize that the question of credibility of witnesses is for the jury and that this court cannot reweigh the evidence, but in view of the conflicting testimony of the plaintiff and her granddaughter as to where and how the accident happened, coupled with the lack of evidence of the alleged defects in the sidewalk and

had a film of ice. The snow was not piled on it. When I got there I found a woman and a little girl, no one else. I talked with the little girl; she showed the city. The place was west of the bakery about nine or ten feet. On cross-examination the witness testified, "My best memory is that the snow was about a foot high on the north half of the sidewalk. I walked that sidewalk every day and the snow was a foot deep in the broken-out portion of the sidewalk, that is the north end."

All of defendant's witnesses testified that only the south half was clear of snow and that the north half was not open to pedestrian use at the time of the occurrence. It appears to me that plaintiff's testimony is inconsistent with her theory, since there is no evidence that there was a hole just a step outside of the bakery or elsewhere in the vicinity. It follows therefore that the verdict of the jury must have been based solely upon the testimony of plaintiff's Granddaughter and the photographer. Officer Schwaner testified that plaintiff's Granddaughter told him that plaintiff fell where the officers found her when they arrived at the scene of the accident. While the photographer and the general manager of the sidewalk and unobscured of the surface on the north half, there is no testimony that the conditions occurring in the photographs are such as would render the sidewalk unsafe for pedestrian use. In Young v. City of

San Francisco, 101 Cal. 102, 32 P. 102, the court said:

"to hold that this sidewalk as constructed was not reasonably safe within the meaning of the law would be virtually to hold that all walks should be smooth and level. This would require of cities perfection in the construction of their walks and would make them virtually insurers against all damages."

We recognize that the question of credibility of witnesses is for the jury and that this court cannot reweigh the evidence, but in view of the conflicting testimony of the plaintiff and her Granddaughter as to where and how the accident happened, coupled with the lack of evidence of the alleged defect in the sidewalk and

the testimony of defendant's witnesses that the north half of the sidewalk in question was not accessible for pedestrian travel because of the depth of the snow, we are impelled to hold that the verdict is against the manifest weight of the evidence.

For the reasons stated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR NEW TRIAL.

KILEY, P.J. AND BURKE, J. CONCUR.

the testimony of defendant's witnesses that the back half of the sidewalk in question was not accessible for pedestrian travel because of the depth of the snow, we are impelled to hold that the verdict is against the earliest weight of the evidence.

For the reasons stated, the judgment is reversed and

the cause remanded for a new trial.

REVEREND AND HONORABLE FOR NEW TRIAL.

BILLY, J. and LUNCE, J. DISSENT.

43326

In the Matter of BENJAMIN HERSHON,
Deceased,

ANNE HERSHON (Claimant),

Appellee,

v.

MAXINE HERSHON, as Administratrix
of the Estate of Benjamin Hershon,
Deceased (Defendant),

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

329 I.A. 328

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant Maxine Hershon, as administratrix of the estate of Benjamin Hershon, seeks to reverse an order of the Circuit Court allowing the claim of Anne Hershon, hereinafter called plaintiff, based upon a written agreement with the deceased Benjamin Hershon, former husband of plaintiff, in the sum of \$2,169.

Plaintiff was the first wife of Benjamin Hershon. She filed her claim in the Probate Court of Cook County alleging that he is indebted to plaintiff on a property settlement agreement entered into at Los Angeles, California on July 14, 1934. Attached to plaintiff's claim is a copy of the agreement, which provides substantially as follows: that the parties are husband and wife; that there was born of the marriage one child, Eugenie Hershon, now five years of age; that for "certain reasons known to the parties it is deemed by them advisable to enter into an agreement whereby their respective property and personal rights will be determined"; that the parties relinquish to each other any right, title or interest in property they now have or may acquire; that Ben Hershon agrees to pay plaintiff the sum of \$5,000 in full settlement of

In the Matter of BENJAMIN HERSHON,
Deceased,

ANNE HERSHON (Claimant),

Defendant,

v.

MAXINE HERSHON, as Administratrix
of the Estate of Benjamin Hershon,
Deceased (Defendant),

Appellant.

DECATUR, GEORGIA

CIRCUIT COURT

COOK COUNTY,

3291 A. 328

BY JUSTICE LEWIS KILPATRICK THE OPINION OF THE COURT.

By this appeal defendant Maxine Hershon, as adminis-

tratrix of the estate of Benjamin Hershon, seeks to reverse an

order of the Circuit Court allowing the claim of Anne Hershon,

hereinafter called plaintiff, based upon a written agreement with

the deceased Benjamin Hershon, former husband of plaintiff, in

the sum of \$2,100.

Plaintiff was the first wife of Benjamin Hershon. She

filed her claim in the Probate Court of Cook County alleging

that he is indebted to plaintiff on a properly acknowledged agreement

entered into at Los Angeles, California on July 14, 1934. Attached

to plaintiff's claim is a copy of the agreement, which provides

substantially as follows: That the parties are husband and wife;

that there was born of the marriage one child, Eugene Hershon, now

five years of age; that for certain reasons known to the parties

it is deemed by them advisable to enter into an agreement whereby

their respective property and personal rights will be determined;

that the parties relinquish to each other any right, title or

interest in property they now have or may acquire; that Ben Hershon

agrees to pay plaintiff the sum of \$2,000 in full settlement of

her property rights, payable in installments over a period of three years and four months, which sum shall include support money for the minor child; that after the \$5,000 provided for in the agreement is fully paid an amount necessary for the support of the minor child will be determined "in accordance with the needs of the child and the ability of Ben Hershon to pay."

The evidence shows that on July 16, 1934, two days after the execution of the agreement in question, Ben Hershon was granted a decree of divorce in Mexico. He thereafter married defendant. The decree does not appear in the record nor is its legality questioned in this proceeding by defendant. Only the following excerpts of the Mexican divorce decree were read by defendant's counsel: "that defendant (plaintiff herein) having been regularly served with process according to the statute in such case made and provided, answered the petition admitting the marriage and all the material allegations of plaintiff (Ben Hershon) as true of her own knowledge; that the evidence in this case was presented and submitted according to articles of civil code of procedure"; and "that the parties in this suit having expressly submitted this case to the courts". . . (Abst. 16).

The parties by their respective attorneys stipulated (Abst. 19) that if there is liability under paragraphs 4 and 5 of the agreement from August 7, 1934 to August 21, 1940, the date of Ben Hershon's death, "to support the minor child, \$8 per week is a reasonable sum for that purpose". They further stipulated that \$250 be added to any amount for which the claim of plaintiff against the estate is allowed.

Two questions are presented. First, was the agreement entered into by plaintiff and her husband Ben Hershon for the

but property rights, say like in installments over a period of three years and four months, which she shall include sweetest money for the minor child; that after the \$10,000 provided for in the agreement is fully paid an amount necessary for the support of the minor child will be determined in accordance with the needs of the child and the ability of Ben Hershon to pay."

The evidence shows that on July 16, 1934, two days after the execution of the agreement in question, Ben Hershon was granted a decree of divorce in Mexico. He thereafter married defendant. The decree does not appear in the record nor is its legality questioned in this proceeding by defendant. Only the following excerpts of the Mexican divorce decree were read by defendant's counsel: "That defendant (plaintiff herein) having been regularly served with process according to the statute in such case made and provided, answered the petition admitting the marriage and all the material allegations of plaintiff (Ben Hershon) as true of her own knowledge; that the evidence in this case was presented and submitted according to articles 27 and 28 of the code of procedure"; and "that the parties in this suit having expressly submitted this case to the courts..." (Exh. 18).

The parties by their respective attorneys stipulated (Exh. 19) that at issue in this suit are paragraphs 4 and 5 of the agreement from August 7, 1934 to August 21, 1940, the date of Ben Hershon's death, "as respects the minor child, 13 now work as a responsible man for that purpose". They further stipulated that \$250 be added to any amount for which the claim of plaintiff against the estate is allowed. The questions are presented. First, was the agreement entered into by plaintiff and her husband Ben Hershon for the

purpose of stimulating a divorce, and therefore against public policy; second, was plaintiff an incompetent witness to testify in her own behalf against the defendant as administratrix.

Harry Rabwin, called in behalf of the defendant, testified by deposition substantially as follows: that he is an attorney at law practicing in the State of California; that in July of 1934 he received a telephone call from plaintiff stating that she was coming in with her husband and wanted a property settlement agreement prepared; that Benjamin Hershon told him he was obtaining a divorce in Mexico; that it was imperative that Mrs. Hershon sign an appearance which the Mexican authorities require before he could obtain a divorce; that he came from Mexico "where he stayed a day or so to make arrangements to obtain a divorce"; that "he was on a spot and had to be in a position to marry another woman in Indianapolis, and that the plaintiff might as well sign the appearance and in the event she refused he would leave the country and never give her or his child any support."

Plaintiff also testified in her own behalf over the objection of the defendant. We shall comment later in this opinion on her testimony.

Defendant urges that the testimony of plaintiff's witness Rabwin shows that the agreement is tainted with collusion. An examination of the record fails to disclose the grounds upon which the decree of divorce was granted. Neither does it appear where or when the divorce proceedings in Mexico were filed. Since the validity of the divorce decree is not questioned we must assume that Ben Hershon, the deceased, was domiciled in Mexico for a period sufficient to warrant the court there in entering the decree. No reference is made in the agreement to any contemplated divorce

purpose of obtaining a divorce, and therefore against public policy; second, was Plaintiff an incompetent witness to testify in her own behalf against the defendant as administrator.

Harry Nelson, called in behalf of the defendant, testified by deposition substantially as follows: that he is an attorney at law practicing in the State of California; that in July of 1934 he received a telephone call from Plaintiff stating that she was coming in with her husband and wanted a property settlement agreement prepared; that Benjamin Nathan told him he was obtaining a divorce in Mexico; that it was imperative that Mrs. Nathan sign an appearance which the Mexican authorities require before he could obtain a divorce; that he came from Mexico where he stayed a day or so to make arrangements to obtain a divorce; that "he was on a spot and had to be in a position to marry another woman in Indianapolis, and that the Plaintiff might as well sign the appearance and in the event she refused he would leave the country and never give her or his child any support."

Plaintiff then testified in her own behalf over the objection of the defendant. We shall comment later in this opinion on her testimony.

Plaintiff argues that the testimony of Plaintiff's witness Nelson shows that the agreement is tainted with collusion, an examination of the record fails to disclose the reasons upon which the decree of divorce was granted. Neither does it appear where or when the divorce proceedings in Mexico were filed. Since the validity of the divorce decree is not questioned we must assume that Ben Nathan, the deceased, was domiciled in Mexico for a period sufficient to warrant the court there in entering the decree. No reference is made in the agreement to any contemplated divorce

proceedings. It merely recites that for "certain reasons known to the parties hereto it is deemed by them advisable to enter into an agreement." It therefore follows that no inference of illegality can be drawn from the language of the agreement. Manifestly defendant does not want the Mexican divorce decree disturbed, for the reason that nullification of the divorce decree would destroy her status as widow and heir of Benjamin Hershon. It is not controverted that Benjamin Hershon importuned the plaintiff to enter into the agreement for the settlement of their mutual rights and that he made payments, though irregularly, to plaintiff under the agreement without ever questioning its validity during his lifetime.

No place of performance is specified in the agreement. It was executed in California and, so far as the record shows, all the payments due under it were made there. It is therefore governed by the law of the place where it was made. (Oakes v. Chicago Fire Brick Co., 388 Ill. 474.) It is conceded by counsel for defendant in their reply brief that the law of California relating to property settlement agreements between husband and wife is substantially the same as in Illinois. (Hill v. Hill, 23 Cal. (2d) 82, page 88.) Agreements between husband and wife are not invalid where the relations between them are such as to render the separation necessary for the health or happiness of one or the other of them. (VanKoten v. VanKoten, 323 Ill. 323, 326; Reighley v. Cent. Ill. Nat. Bank, 390 Ill. 242, 253. In Kohler v. Kohler, 316 Ill. 33, 37, the court in discussing the terms of a similar agreement said:

"The contract speaks for itself, and conversations leading up to the contract are not competent evidence to be considered by the court."

Defendant's position, that the agreement in question is against public policy, is in our opinion untenable.

proceedings. It merely recites that for "certain reasons known to the parties hereto it is deemed by them advisable to enter into an agreement." It therefore follows that no inference of illegality can be drawn from the language of the agreement. Manifestly defendant does not want the Mexican divorce decree disturbed, for the reason that nullification of the divorce decree would destroy her status as widow and heir of Benjamin Harrison. It is not controverted that Benjamin Harrison maintained the claim till he entered into the agreement for the settlement of their mutual rights and that he made payment, though irregularly, to plaintiff under the agreement without ever questioning its validity during his lifetime.

No place of performance is specified in the agreement. It was executed in California and, so far as the record shows, all the payments due under it were made there. It is therefore governed by the law of the place where it was made. (*Quaker v. Chicago Wire Works Co.*, 222 Ill. 474.) It is conceded by counsel for defendant in their reply that the law of California relates to property settlement agreements between husband and wife is substantially the same as in Illinois. (*Hill v. Hill*, 22 Cal. (2d) 287, page 29.) Agreements between husband and wife are not invalid where the relations between them are such as to render the transaction necessary for the health or happiness of one or the other of them. (*Vanhook v. Vanhook*, 222 Ill. 327, 222; *Leitch v. Leitch*, 220 Ill. 242, 243. In *Leitch v. Leitch*, 220 Ill. 242, 243, the court in discussing the terms of a similar agreement said:

"The contract speaks for itself, and conversations leading up to the contract are not competent evidence to be considered by the court."

Defendant's position, that the agreement in question is against public policy, is in our opinion untenable.

Defendant's next contention is that plaintiff was an incompetent witness to testify in her own behalf against the administratrix, relying on section 2 of the Evidence and Depositions Act of the State of Illinois (Ill. Rev. Stats. 1943, ch. 51.). The evidence discloses that ~~XXXX~~ the plaintiff testified in her own behalf by deposition on February 14, 1944, over the objection of defendant. Thereafter the cause was continued from time to time. On May 1, 1944, Mr. Goldfine, counsel for defendant, requested an opportunity to take depositions in California to prove that the amount claimed by plaintiff had been paid in full. The trial court granted defendant further continuances for this purpose. On June 23, 1944, Mr. Goldfine read into evidence the deposition of plaintiff, which he had obtained in the meantime. Plaintiff maintains that the action of defendant in calling plaintiff as his own witness on June 23, 1944 waived defendant's former objection to plaintiff's testimony. Defendant urges in her reply brief that "the deposition of plaintiff was offered by the defendant long after plaintiff's original deposition was offered," and therefore defendant's objection to plaintiff's original testimony is still valid. We can not see the force of this argument. After defendant procured and read plaintiff's deposition at the hearing on June 23, 1944 it became part of the evidence introduced at the trial. We hold that this action of defendant constituted a waiver of the objection made when the plaintiff testified previously in her own behalf. All the questions propounded by defendant's counsel appearing in plaintiff's second deposition which was read at the hearing of June 23, 1944 related only to payments made by Ben Hershon to plaintiff under the terms of the agreement. Since defendant's counsel waived his objection to plaintiff's testimony

Defendant's next objection is that Plaintiff was an
incompetent witness to testify in her own behalf against the
administration, relying on section 2 of the Evidence and Depositions
Act of the State of Illinois (Ill. Rev. Stat. 1943, ch. 111). The
evidence discloses that XXXXX the Plaintiff testified in her own
behalf by deposition on February 14, 1944, over the objection
of defendant. Thereafter the case was continued from time to
time. On May 1, 1944, Mr. Goldfine, counsel for defendant, requested
an opportunity to take depositions in California to prove that
the amount claimed by Plaintiff had been paid in full. The trial
court granted defendant further continuances for this purpose.
On June 23, 1944, Mr. Goldfine read into evidence the deposition
of Plaintiff, which he had obtained in the meantime. Plaintiff
maintains that the action of defendant in calling Plaintiff as his
own witness on June 23, 1944 waived defendant's former objection
to Plaintiff's testimony. Defendant urges in her reply brief
that "the deposition of Plaintiff was offered by the defendant
long after Plaintiff's original deposition was offered," and
therefore defendant's objection to Plaintiff's original testimony
is still valid. We can not see the force of this argument. After
defendant produced and read Plaintiff's deposition at the hearing
on June 23, 1944 it became part of the evidence introduced at
the trial. We hold that this action of defendant constituted a
waiver of the objection made when the Plaintiff testified previously
in her own behalf. If the questions propounded by defendant's
counsel appearing in Plaintiff's second deposition which was read
at the hearing on June 23, 1944 related only to payments made by
Ben Nathan to Plaintiff under the terms of the agreement. Since
defendant's counsel waived his objection to Plaintiff's testimony

in the first instance by having her testify on the second occasion, all of her testimony concerning payments which she received from Ben Hershon became admissible as though no objection had ever been interposed. This evidence we think amply justified the trial court in finding a balance of \$919 due on the original sum of \$5,000 as provided in the agreement.

Since we have held that the agreement is not against public policy the defendant is also liable for \$1,000 representing support money for Eugenie Hershon at the rate of \$8 weekly as stipulated, plus the sum of \$250 which the parties agreed should be added to any amount for which the claim of plaintiff against the estate is allowed.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J. AND BURKE, J. CONCUR.

in the first instance by having her testify on the second occasion, all her testimony concerning payments which she received from the person became admissible as though no objection had ever been interposed. His evidence we think amply justified the trial court in finding a balance of \$12 due on the original one of \$2,000 as provided in the agreement.

Since we have held that the agreement is not against public policy the defendant is also liable for \$1,000 representing support money for Leticia Watson at the rate of \$8 weekly as stipulated, plus the sum of \$200 which the parties agreed should be added to any account for which the claim of plaintiff against the estate is allowed.

For the reasons stated, the judgment is affirmed.

JUDGMENT AFFIRMED.

FILED, J. J. AND WARD, J. J. JUDGES.

43772

MATTHEW T. FINN, et al.,
Appellees,

v.

EMMAUS EVANGELICAL LUTHERAN
CHURCH, a Religious corpor-
ation, et al.,
Appellants.

421 A
INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

329 I.A. 343

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendants seek to reverse an order entered by the Superior court of Cook county temporarily restraining and enjoining defendant church from constructing a church on lots 95 and 96 which are located at the south-east corner of Washington and Austin Boulevards.

The record discloses that plaintiff, Matthew T. Finn, and his wife, Mae Finn, owned a residence located on the south side of Washington Boulevard an east and west street in Chicago, immediately east of and adjoining the two lots on which the Emmaus Evangelical Lutheran Church was starting to erect a church. The basis of plaintiffs' suit is that in 1907 the owner of the lots in question and other lots located on each side of Washington Boulevard and East Austin Avenue, conveyed the property, restricting its use so that the grantees were prohibited from erecting any building on the lots "to be used or occupied for any other purpose than a private residence or dwelling house the necessary barns, stables and out houses excepted and any private residence or dwelling house erected on said premises or any part thereof shall cost not less than \$2500.00." And that no building should be erected beyond the building line which was 40 feet from the street. The deed also contained the

STATE

IN SENATE
JANUARY 11, 1900.

v.

THE STATE OF NEW YORK
IN SENATE
JANUARY 11, 1900.

INTERLOCUTORY

IN SENATE

JANUARY 11, 1900.

IN SENATE

322 I. A. 843

THE STATE OF NEW YORK, SENATE, JANUARY 11, 1900.

BY THIS SPECIAL RESOLUTION, passed at the

SENATE, on the 11th day of January, 1900,

resolving and enjoining defendant to pay to the plaintiff

a sum of one hundred and no cents, the sum of

one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

and his wife, the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

in Chicago, the sum of one hundred and no cents, and to pay to the plaintiff

on which the plaintiff has a claim, and to pay to the plaintiff

to erect a monument, the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

the sum of one hundred and no cents, and to pay to the plaintiff

2.

following: "And it is expressly understood and agreed that the several covenants above specified shall attach to and run with the land."

The order for the temporary injunction was issued upon plaintiffs filing a bond for \$3,500 to be approved by the court, with which plaintiffs complied. The bond was filed and approved and this appeal followed. While a great many points are made by counsel for defendants we think that on this appeal it is necessary to refer to but one.

An examination of the record discloses that it was agreed on the hearing before the chancellor that the restrictions in the deed above mentioned were valid and binding but defendants contend that this restrictive covenant is no longer effective in view of the change in the neighborhood because it had been repeatedly violated by the construction of apartment buildings on a number of other lots in the restricted area. And further, that a number of residences erected on Washington Boulevard violated the 40 foot building line restrictions. The merits of the latter contention must be determined on the final hearing.

In defendants' answer it is alleged that in 1923 the City of Chicago passed a zoning law by which the block in which the lots in question were situated was zoned for apartment buildings and churches but this point is not argued in the brief and of course is without merit for the reason that a valid restriction upon the use of property incorporated in deeds, by which the owners hold title and which in no way threatens the safety, health, comfort or the general welfare, is neither nullified nor superseded by the adoption of a zoning ordinance. Dolan v. Brown, 336 Ill. 412. We are also of opinion that the contention made by defendants that the restrictive covenant is no longer effective because of the erection of apartment buildings is equally without merit. Voorhees v. Blum, 274 Ill. 319, where it is held that a

3.

restriction in a deed that the grantee should not erect any building except "a single detached dwelling house" did not prohibit the erection of a flat or apartment buildings.

In Mayer v. Colling, 263 Ill. App. 219, we held that upon an appeal from an order granting an interlocutory injunction the court will not necessarily determine the rights of the parties upon the merits of the cause but only determine whether the order was probably necessary to preserve the equitable rights of the parties. That one of the tests was the balancing of the practical advantages against the disadvantages of maintaining the status quo until final disposition. And as said in People v. Standidge, 333 Ill. 361, "An interlocutory injunction is merely provisional in its nature and does not conclude a right. It usually stands as a binding restraint until rescinded by the further action of the court. Its object is to preserve the subject in controversy, but it is not decisive of the cause upon the merits. The court merely recognizes the fact that, without expressing a final opinion, a sufficient showing has been made to warrant the preservation of the property or the rights in issue in statu quo until a hearing may be had upon the merits of the cause. The granting of an interlocutory injunction necessarily rests largely in judicial discretion, to be exercised in view of the facts of the particular case." See also Nestor Johnson Mfg. Co., v. Goldblatt, 371 Ill. 570.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

Niemeyer and Feinberg, JJ., concur.

IN WYATT V. UNITED STATES, 354 U.S. 524, 82 S.2d 568, 25 AFTR2d 56-6088, 56-2 USTC ¶10,000, 12-10-56, the Supreme Court held that the Government's refusal to issue a passport to a person who had been convicted of a crime was not a violation of the Fifth Amendment's due process clause.

[illegible]

1995

190000 4.11 3.000000 100 3.000000

Abstract

329 I.A. 203

Gen. No. 10071.

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1946.

HOWARD L. JOHNSON, for the use of JOSEPH
MARIETTA,
Plaintiff (Appellee),

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,
Defendant (Appellant).

Appeal from
Circuit Court,
DeKalb County.

HOWARD L. JOHNSON, for the use of EDITH
MARIETTA,
Plaintiff (Appellee),

vs.

WESTERN CASUALTY AND SURETY COMPANY,
a corporation,
Defendant (Appellant).

WOLFE,-- P. J.

William R. Cosgrove was the owner of a Cadillac automobile, and was insured under a policy of insurance, of the Western Casualty and Surety Company. Early on the morning of May 30, 1943, the plaintiffs in this case, Howard L. Johnson and his wife, met Cosgrove in his place of business in LaSalle, Illinois. Cosgrove and his wife and

121
7-12

8261.A.1688

NOV 10 1901

RECEIVED
JUL 10 1901

RECEIVED
JUL 10 1901

RECEIVED
JUL 10 1901

RECEIVED
JUL 10 1901

RECEIVED
JUL 10 1901

RECEIVED
JUL 10 1901

RECEIVED
JUL 10 1901

the Johnsons got into the Cosgrove automobile and drove to Spring Valley, Illinois. They went to a tavern in Spring Valley, and while at the tavern, there was some discussion about the Johnsons going to see some friends in Spring Valley, and bringing them down to the tavern. The Johnsons took the Cosgrove car to go to see the friends, and arrived at the home of Joseph and Edith Marietta. The Mariettas got into the Cosgrove car with the Johnsons, and on the way back to the tavern, they had an automobile collision in which the Mariettas were injured.

The Mariettas started suit against Howard Johnson for personal injuries, alleging they sustained damage in the collision because of the negligence of Johnson. Joseph Marietta procured a judgment against Howard L. Johnson for \$2750.00 and Edith Marietta likewise procured a judgment against Howard L. Johnson for the sum of \$2750.00. The two judgments against Howard L. Johnson aggregating \$5500.00. Executions were issued on these judgments, and were returned by the sheriff marked, "No part satisfied and no property found." Joseph Marietta and Edith Marietta started suit in the Circuit Court of DeKalb County, against the Western Casualty Insurance Company alleging that the defendant, Johnson, had no property that was liable to execution, and that they had just and reasonable grounds to believe that the Western Casualty Insurance Company is indebted to said defendant, or has effects or estate of his in its possession, custody and charge.

Affidavits of garnishment were filed by the Mariettas stating that they believed the Western Casualty Insurance Company is indebted to the defendant, and prayed for summons against the

The defendant was not the owner of the automobile and drove to Springfield, Illinois. The car was in a garage in Springfield, and when at his father's, there was some discussion about the defendant going to use some money in Springfield, and bringing them down to the father. The defendant took the car down and to see the father, and arrived at the home of the father and mother. The defendant got into the car and drove away from the father, and on the way back to the father, there was an automobile collision in which the father's car was damaged.

The defendant was not the owner of the automobile and drove to Springfield, Illinois. The car was in a garage in Springfield, and when at his father's, there was some discussion about the defendant going to use some money in Springfield, and bringing them down to the father. The defendant took the car down and to see the father, and arrived at the home of the father and mother. The defendant got into the car and drove away from the father, and on the way back to the father, there was an automobile collision in which the father's car was damaged.

The defendant was not the owner of the automobile and drove to Springfield, Illinois. The car was in a garage in Springfield, and when at his father's, there was some discussion about the defendant going to use some money in Springfield, and bringing them down to the father. The defendant took the car down and to see the father, and arrived at the home of the father and mother. The defendant got into the car and drove away from the father, and on the way back to the father, there was an automobile collision in which the father's car was damaged.

3.

Casualty Company. Interrogatories were directed to the defendant, the Casualty Company, and answers were filed by it stating that Howard L. Johnson was driving the automobile in question, without the permission of the insured, William R. Cosgrove, and that Johnson was not covered by the policy.

Joseph Marietta and Edith Marietta each filed a traverse to the answer of the Western Casualty and Surety Company, in which they state that said company has not fully discovered all of the effects, etc., and the value thereof, in their possession or custody that is due and owing to Howard L. Johnson, and prayed that the same may be inquired into, pursuant to the Statute in such cases made and provided.

The case was tried before the Court without a jury. The judge found the issues in favor of the plaintiffs and entered judgment in their favor, each for the amount of \$2032.80, which included interest from the 20th day of September 1944, and then assessed the costs of the suit against the defendant. It is from these judgments that the Western Casualty and Surety Company has perfected an appeal to this Court.

It is stated in appellant's brief and statement of facts, "The sole issue of fact before the trial court and before this court on appeal, is whether or not Johnson had the permission of Cosgrove to use and drive the car at the time of the accident, and whether he was "insured," as defined in the policy." It is conceded by the

the perusal of the letter, William H. Coffey, and the Johnson was not covered by the policy.

provided.

The case was filed before the court without a jury. The judge found the evidence in favor of the plaintiff and awarded judgment in their favor, each for the amount of \$100.00, with interest thereon from the 15th day of September 1944, and costs assessed the costs of the suit against the defendant. It is now ordered that the above judgment be entered and that the costs be included as above.

[illegible]

4.

appellees that this case involves only a question of fact, as stated by the appellant in its brief. At the conclusion of the hearing, the trial court reviewed the evidence in question, and stated which witnesses he believed worthy of credit, and stated that Mr. Cosgrove's testimony as to what occurred at the time the Johnsons took the car was very unsatisfactory. It appears that Mr. Cosgrove at first, in giving his version of what happened, stated that he had given Johnson permission to drive the car, and later at the time of the trial, said that he did not give him such permission. The Court stated that he believed that Cosgrove's first statement was true, and his second statement was false. After a review of all of the evidence, the Court said it was his conclusion, that the evidence of the Johnson's was true and that Cosgrove did give Johnson permission to drive the car, as claimed by the plaintiffs.

It has been repeatedly held, both by the Supreme Court and the Appellate Court, that when a trial judge hears the case without a jury, he is the judge of the credibility of the witnesses. It is his province to draw the ultimate conclusion whether the evidence preponderates in favor of the plaintiff, or the defendant. Controverted questions of fact are for the trier of the facts, and after a determination of fact has been made by a trial judge hearing a case without a jury, or a jury, when they have determined the facts in the case, such determination of facts will not be set aside by the Appellate Court, unless it is manifestly against the weight of the evidence. *Marble vs. The Estate of Marble*, 304 Ill., 232; *Martin*

5.

vs. The Village of Patoka, 305 Ill. App., 51, and Becherer vs. Belleville-St. Louis Coach Company, 322 Ill. App. 37.

We have read the evidence, as abstracted in this case, and it is our opinion that the trial Court's summary of the evidence is well supported by the record in this case, and that the plaintiffs in the trial court established the fact that at the time of the accident in question, Johnson was driving the Cosgrove car with his permission. Therefore, the judgment of the trial court should be affirmed.

Judgment affirmed.

For the purpose of the present report, the following facts are given:

1. The first of the three cases mentioned above, is the case of

the first of the three cases mentioned above, is the case of

and it is the opinion of the writer that the evidence

is well supported by the facts of the case, and that the

facts in the case are well supported by the facts of the case

and the evidence is well supported by the facts of the case

with this exception. Therefore, the facts of the case

should be affirmed.

Respectfully,
[Signature]

Abstract

329 I.A. 104

Gen. No. 10074.

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT.
FEBRUARY TERM, A.D. 1946.

220 3

STEVE KALANOVSKY and BENT LAVI,
Plaintiffs-Appellants.

vs.

JACOB SEPPALA, also known as
JACK SEPPALA,
Defendant-Appellee.

Appeal from
Circuit Court,
Lake County.

WOLFE,-- P. J.

Steve Kalanovsky and Bent Lavi started a suit in the Circuit Court of Lake County, for damages they claimed from Jacob Seppala, also known as Jack Seppala, because of the failure of Seppala to carry out the terms of a contract of sale of a tavern located in Waukegan, Illinois. On June 27, 1944, an agreement was entered into between the parties, which is as follows: "AGREEMENT June 27, 1944, We Steve Kalanovsky and Bent Lavi, buying the McAlister Tavern from Jack Seppala consisting of:-- back bar, front bar, one register, one ice box, cooler in basement, fan tables and chairs and kitchen equipment plus whiskey on bar and five cases additional whiskey and all wine in place, including all licenses. Sales price Thirty-five Hundred Dollars (\$3,500.00).

2.

"Three Hundred Dollars (\$300.00) received as down payment.

Total	\$3,500.00
Paid	300.00

Bal.	\$3,200.00
------	------------

Signed

JACK SEPPALA
STEVE N. KALANOVSKY
BENT LAVI"

The \$300.00 provided for in the agreement was paid by the plaintiffs to the defendant. The plaintiffs allege in their complaint that they tendered the balance of the money to the defendant and asked for a bill of sale for the tavern, as specified in the agreement, but that the defendant refused to comply with the agreement, and therefore, the plaintiffs were damaged to the extent of \$7,500.00. The defendant asked for a bill of particulars, which was filed.

The defendant filed his answer in which he admitted the signing of the agreement, but he claims the written agreement does not contain the full contract. It is his contention that, as part of the oral contract of sale, the plaintiffs were to procure a lease on the building in which the tavern was located, namely, 708 McAlister Avenue, Waukegan, Illinois, but that the plaintiffs had failed to obtain such lease, therefore, the agreement was not binding. The case was submitted to the trial court without a jury. After hearing the evidence, the Court found in favor of the defendant, and rendered a judgment in his favor, and it is from this judgment that this appeal has been perfected to this Court.

"Three Hundred Dollars (\$300.00) received as down payment.

Total	\$3,500.00
Balance	300.00

Pay.	\$3,500.00
------	------------

Signature

JACK L. LAMAR
ST. W. L. LAMAR
ST. W. L. LAMAR

The \$300.00 provided for in the agreement was held by the plaintiffs to the defendant. The plaintiffs allege in their complaint that they tendered the balance of the money to the defendant and asked for a bill of sale for the same, as specified in the agreement, but that the defendant refused to comply with the agreement, and wherefore the plaintiffs were damaged to the extent of \$3,500.00. The defendant moved for a bill of particulars, which was filed.

The defendant filed his answer in which he admitted the signing of the agreement, but he claimed the written agreement does not contain the full contract. It is his contention that, as part of the full contract of sale, the plaintiffs were to procure a lease on the building in which the tavern was located, namely, 100 Hollister Avenue, Waukegan, Illinois, but that the plaintiffs had failed to obtain such lease, whereby the agreement was not binding. The case was submitted to the trial court without a jury. After hearing the evidence, the court found in favor of the defendant, and rendered a judgment in his favor, and it is a fact that this appeal has been perfected to this Court.

3.

It is agreed that the written statement was signed by the parties to this litigation, and that on the 28th of June 1944, Mr. Seppala made a Vendor's Affidavit of Creditors, to comply with the Bulk Sale's Act. The evidence shows that Mr. Kalanovsky and Mr. Lavi visited the tavern on several occasions after the agreement was signed, and were introduced by Mr. Seppala, to many of the customers, as the "new owners of the tavern." On July 10, 1944, Kalanovsky and Lavi addressed a letter to Seppala making an offer of tender of the balance due on the contract, and demanded that Mr. Seppala make the transfer of the tavern business, as agreed upon on the 27th of June. On July 12, 1944, Seppala addressed a letter to Kalanovsky and Lavi, in which he declined to make the transfer and inclosed a bank draft of \$300.00 to repay Kalanovsky and Lavi for the deposit they had made to him at the time the written agreement was entered into. The plaintiffs refused to accept the draft, or to have it cashed.

It appears from the evidence that on July 1, 1944, Mr. Seppala sold this same tavern to Mr. Sidney Kolinsky for the sum of \$4,200.00.

The main issue of the disputed facts in the case, is whether the claim of Seppala that as part of the sales contract, the plaintiffs would have to procure a lease on the building in which the tavern was located is true. He swears positively that this was part of the agreement, and both of the plaintiffs swear positively that there was no such condition attached to the sale of the tavern. The written agreement signed by the parties is brief, but it says nothing whatsoever in regard

It is agreed that the written statement was made by the parties to this litigation, and that on the 18th of June 1914, Mr. Gopala made a Vendor's Affidavit of Creditors, in conformity with the Public Sale Act. The evidence shows that Mr. Kalyanji and Mr. Datt visited the tavern on several occasions after the agreement was signed, and were introduced by Mr. Gopala, to many of the customers, as the new owners of the tavern. On July 10, 1914, Kalyanji and Datt addressed a letter to Gopala making an offer of half of the balance due on the contract, and demanded that Mr. Gopala make the transfer of the tavern business, as agreed upon on the 18th of June, on July 10, 1914. Gopala addressed a letter to Kalyanji and Datt, in which he declined to make the transfer and enclosed a draft for Rs. 2,000 to pay Kalyanji and Datt for the deposit they had made on the 18th of June. At the time the written agreement was entered into, the plaintiffs refused to accept the draft, or to have it cashed.

It appears from the evidence that on July 11, 1914, the plaintiffs left this same tavern to Mr. Datt Kalyanji for the sum of Rs. 2,000.00.

The main issue of the disputed facts in the case, is whether the claim of Gopala that as part of the sales contract, the plaintiffs could have to procure a lease on the building in which the tavern was located is true. The answer positively that this was part of the agreement, and both of the plaintiffs swear positively that there was no such condition attached to the sale of the tavern. The written agreement signed by the parties is brief, but it says nothing whatever in regard

4.

to a lease of the premises, so the question of the lease of the premises, as being a condition subsequent to the sale, must rest upon the oral evidence in the case. It seems strange that if Mr. Seppala did not consider that there was a completed sale of the property, that he would introduce the prospective purchasers, as the new owners of the business, and that he would, the next day after the signing of the agreement, file a Vendor's Affidavit of Creditors. We are aware of the rule of law that where a Court has tried a case without a jury, that his findings should be given great weight by a court of review, and should not be reversed, unless we find that it is contrary to the manifest weight of the evidence. In this case we think the facts and circumstances show that there was no such condition attached to the agreement, as contended by the defendant, Seppala, but the weight of the evidence supports the contention of the plaintiffs, that there was a completed sale of the tavern in question.

It is contended by the appellee that the plaintiffs could not recover because the agreement to sell would be inoperative, because the plaintiffs could not procure a license to carry on the business. We find no merit in this contention, as ordinarily it would not be any concern of the seller what the purchaser would do with the property, after the possession of the same was delivered to them.

It is also contended that even assuming that the agreement between the parties had been valid, and a sale agreed upon, the judgment of the trial court was correct, because the plaintiffs had not shown how they were damaged. One of the items in their bill of particulars,

to a lease of the premises, as the question of the lease of the premises, being a condition precedent to the sale, must rest upon the oral evidence in the case. It seems strange that if Mr. Cepeda did not consider that there was a completed sale of the property, that he would introduce the prospective purchaser, as the new owners of the business, and that he would, the next day after the signing of the agreement, file a Vendor's Affidavit of Completion. He was aware of the rule of law that there is a completed sale without a deed, that the findings should be given rest weight by a court of review, and should not be reversed, unless we find that it is contrary to the manifest weight of the evidence. In this case we think the facts and circumstances show that there was no such condition attached to the agreement, as contended by the defendant, but the weight of the evidence supports the contention of the plaintiff, that there was a completed sale of the business in question. It is contended by the defense that the plaintiff could not recover because the agreement to sell would be inoperative, because the plaintiff could not procure a license to carry on the business, and find no merit in this contention, as obviously it could not be the concern of the seller what the purchaser would do with the property, after the possession of the same was delivered to them. It is also contended that even assuming that the agreement between the parties had been valid, and a sale agreed upon, the judgment of the trial court was correct, because the plaintiff had not shown how they were damaged. One of the items in their bill of particulars,

5.

is "loss occasioned by increase in value of physical property is \$1,000.00." The evidence shows that the plaintiffs had purchased the property for \$3,500.00, and three days later the defendant sold it for \$4,200.00. This certainly would be some evidence that the plaintiffs had been damaged, and entitled to such damages as they had sustained, because the defendant refused to carry out his part of the contract. The judgment of the trial court is reversed, and the cause remanded.

Judgment reversed and cause remanded.

is "lost occasion" by reference to value of physical property, is
 1,000.00. The value shown for the plaintiff's property is
 the property for 1,000.00, and the value shown for the defendant is
 it for 1,000.00. This certainly would be some evidence that the
 plaintiff's had been damaged, and entitled to such damages as they
 had sustained, because the defendant refused to carry out his part of
 the contract. The defendant of the trial court is reversed, and the
 same remanded.

Reversed and remanded.

Gen. No. 10077

329 I.A. 04

-1-

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WILLIAM, A. D. 1944

Gen. No. 10007

LEO A. HARTMAN,

Plaintiff and Cross Defendant-Appellant,

vs

E. W. LAYTON,

Defendant and Cross Plaintiff-Appellee,

Appeal from

The Circuit Court

of Kane County

Briefs, 1.

This is an appeal from a judgment in the amount of \$1450.00 rendered by the Circuit Court of Kane County, in favor of E. W. Layton, Plaintiff-Appellee, against L. A. Hartman, Defendant-Appellant, and from a judgment entered against Plaintiff as cross complainant. We will refer to the parties, respectively, as Plaintiff and Defendant.

The complaint was in equity and it is, setting aside the for breach of contract and for a declaration of title and a quiet title. Defendant filed his counter-claim asking judgment against Plaintiff for the amount of the note. The case was heard before the court without jury. By agreement the note, mortgage, deed and other were placed in the custody of the Clerk of the Circuit Court of Kane County to await the result of the suit.

Plaintiff purchased a new tractor and plow of defendant in October, 1943. A chattel mortgage on the outfit in the amount of \$1750.00 was given by the Plaintiff on October 30, 1943. The defendant claims that no money was paid to him. Plaintiff claims that in addition to the note and mortgage, he gave the defendant

fifteen ~~Twenty~~-Dollar bills in the kitchen of the plaintiff's home, for which he received no receipt. Thus there is a dispute as to whether the purchase price was \$1550.000 or \$1250.00.

Plaintiff testified that he conferred with defendant in regard to the purchase of this tractor and plow a few days before October 30, 1943, and that on October 30, 1943, the tractor and plow were delivered by the defendant to the plaintiff's farm. Several rows were then plowed by the defendant and the plaintiff's hired man, and then, plaintiff and defendant retired to the kitchen where the transaction was closed.

The defendant does not deny that he warranted the tractor to be in good working order, and that it had a new block in it. Plaintiff testified that he advised defendant that he wanted the tractor in order to get his fall plowing done, but that he did not tell the defendant how many acres he had to plow. He also testified that within only a few days after the tractor was delivered, it was discovered that there was a crack in the block, and water was mixed with the oil; and that it did not have sufficient power to pull the plow. He claimed that he notified the defendant and his agent--wrote him three times and phoned the agent, and that defendant refused to get the tractor or do anything about having it repaired.

Plaintiff testified that he owned another tractor and had had experience with various tractors for twenty years. He made no attempt to have this tractor repaired or to purchase a new block. He stated that his reason for that was that "It wasn't any of my part to have it fixed." He said the tractor wasn't "worth a dime."

Testimony for the defendant was to the effect that the crack must have been caused by freezing; and that an examination by a skilled mechanic showed that the loss of power was not because of the crack, but because someone had tampered with the tappets, and

fifteen twenty-dollar bills in the kitchen of the plaintiff's home, for which he received no receipt. There is a dispute as to whether the purchase price was \$150.00 or \$155.00.

Plaintiff testified that he conferred with defendant in regard to the purchase of this tractor and plow a few days before October 30, 1943, and that on October 30, 1943, the tractor and plow were delivered by the defendant to the plaintiff's farm. Several hours were then plowed by the defendant and the plaintiff's hired man, and then, plaintiff and defendant retired to the kitchen where the transaction was closed.

The defendant does not deny that he warranted the tractor or to be in good working order, and that it had a new block in it. Plaintiff testified that he advised defendant that he wanted the tractor to be in good working order, but that he did not tell the defendant how many acres he had to plow. He also testified that within only a few days after the tractor was delivered, it was discovered that there was a crack in the block, and that it was mixed with the oil; and that it did not have sufficient power to pull the plow. He claimed that he notified the defendant and his agent--told him three times and showed the agent, and that defendant refused to get the tractor or do anything about having it repaired.

Plaintiff testified that he owned another tractor and had had experience with various tractors for twenty years. He made no attempt to fix this tractor repaired or to purchase a new block. He stated that his reason for that was that "it wasn't any of my part to have it fixed." He said the tractor wasn't "worth a dime."

Testimony for the defendant was to the effect that the crack must have been caused by freezing; and that an examination of a skilled mechanic showed that the loss of power was not because of the crack, but because someone had tampered with the tappet, and

that adjustment of them readily produced power and restored the engine to good working order.

Plaintiff claims damages for breach of warranty because he was compelled to employ others to do his fall plowing, he was delayed in the spring because he did not have the use of the tractor and had to employ others to plant his corn and cultivate the same, and because he had 150 acres of corn land to be "fall plowed" but was successful in having only 100 acres of this land plowed, which left 50 acres for spring plowing, and since that land was not "fall plowed" the yield on it was reduced on the average of 30 bushels per acre. The plaintiff's story about the transaction wherein he claims he paid defendant \$300 in cash and received no receipt for it, and that the yield was 30 bushels per acre less on the 50 acres of "spring plowed" land because it was not "fall plowed" was scarcely entitled to the credence that the trial court accorded it.

The trial court allowed the plaintiff \$300.00 which he says he was compelled to pay for plowing; \$750.00 for the loss of corn yield ~~xx~~ because of the spring plowing of the 50 acres, ~~xx~~ the loss ~~allowed~~ being 15 bushels per acre at one dollar per bushel; \$87.00 for cultivating; \$55.00 for planting; and \$300.00 ~~xxxx~~ for the cash claimed to have been paid by plaintiff to defendant; less a credit of \$24.00 for 8 acres plowed with this tractor. Also, the court ordered the tractor and plow returned to the defendant and the notes and mortgage cancelled.

We have carefully read all of the evidence in the record, and have reached the conclusion that there is not sufficient evidence to warrant the assessment of damages as awarded by the court.

Plaintiff, as required by the court on motion, elected to base his recovery under Section 69-b of the Uniform Sales Act, Illinois Statute, State Bar Edition, Chapter 121 $\frac{1}{2}$ -Sales. This section 69 provides as remedies for breach of warranty by the seller

that adjustment of them readily procured power and restored the

engine to good working order.

Defendant's attorney for breach of warranty because

he was compelled to employ others to do his fall plowing, he was

delayed in the spring because he did not have the use of the tractor

and had to employ others to plant his corn and cultivate the same,

and because in his fall plowing he was "fall plowed" out

was successful in having only the corners of his land plowed, which

left 80 acres for spring plowing, and since that land was not "fall

plowed" the yield on it was reduced on the average of 10 bushels

per acre. The plaintiff's loss is of the transaction wherein he

closed his fall plowing work in cash and received no credit for

it, and that the yield was 10 bushels per acre less on the 80 acres

of spring plowed land than it was not "fall plowed" was properly

added to the cash value of the 80 acres according to

The trial court allowed the plaintiff \$200.00 which he

was entitled to pay for plowing; \$200.00 for the loss of

corn yield on the 80 acres of the spring plowing of 80 acres; the

loss allowed being 10 bushels per acre at the value of 10 bushels;

\$200.00 for plowing; \$200.00 for plowing; and \$200.00 for

the cash value of the 80 acres of land which the plaintiff is entitled to

a credit of \$200.00 for a total of \$600.00. The court, then, the

court allowed the tractor and plow returned to the defendant and

the notes and mortgage cancelled.

We have carefully read all of the evidence in this record,

and have reached the conclusion that there is not sufficient evi-

dence to warrant the judgment of the court as rendered by the court.

Defendant, as required by the court on motion, elected

to bear his recovery under Section 88-B of the Uniform Sales Act,

Illinois Statutes, Chapter 121-1-1-1. This

section is amended to read: For one of warranty by the seller

that the buyer may at his election-

(b) "Accept or keep the goods and maintain an action against the seller for damages for breach of warranty.

(d) "Rescind the contract to sell or sale *** if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(6) "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from a breach of warranty.

(7) "In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty."

It is the duty of the buyer of an article to minimize whatever special damages he is claiming as a result of a breach of warranty, even to the extent of making repairs on machinery wherever such is necessary or possible. American Oil Pump & Tank Co. vs Foust, 274 Pac. 322, 325; Butte Floral Co. vs Reed, 65 Mich.138; 211 Pac. 325; Tomita vs Johnson, 290 Pac 395, 396. Aultman & Co. vs Case, 68 Wis. 612, 32 N.W. 772. The cases of Wiggins vs Jackson,
and
21 Okla. 292, 121 Pac. 662; Lippa vs, Oglesby 163 Atl. 885, present somewhat analagous situations to the one involved herein. In the former case horses were furnished to cultivate a certain 70 acre tract of land, and though warranted to be sound, were found unsound and unusable. It was held that a cause of action for loss of

that the buyer say at his election.

(5) "except or keep the goods and maintain an action against the seller for breach of warranty."

(6) "Rescind the contract to sell or refuse it if the goods have already been received, return them or other to return them to the seller and recover the price or any part thereof which has been paid."

(7) "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

(8) "The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty."

(9) "In the case of breach of warranty of quality, the measure of damages is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered the warranty."

It is the duty of the buyer of an article to ascertain whether special damages he is claiming are a result of a breach of warranty, even to the extent of making repairs in machinery here-
 ever such is necessary or possible. American Oil Pump & Tank Co. v. Fount, 201 Pac. 823, 228; Butte Floral Co. v. Reed, 66 Mich. 158; Oil Pac. 155; Tomlin v. Johnson, 201 Pac. 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

crops is not stated unless it be averred and proved that other horses were not to be had on the market to cultivate the land, or, if they could be had, the purchaser was unable to buy them. The rule that the buyer cannot recover of prospective future gains where he might reasonably have avoided such loss, applies to actions for breach of warranty, and the buyer must minimize such damages, if reasonably possible. 46 American Jurisprudence - Sales - Actions for Damages for Breach of Warranty, 737, 753, 756.

The owner cannot permit machinery to remain idle for an unreasonable time and delay operation of the machine, and recover damages for the whole period. When he discovers the defect, he can recover reasonable compensation for its loss of use during the period necessary to make repairs. Strawn vs Cogswell, 28 Ill. 457; Phelan vs Andrews, 52 Ill. 486. If installing an auxiliary heater would cost less than the damages, the cost of installation would be the measure of damages. Bass Foundry & Machine Co. vs Sulzberger, 205 Ill. App. 454, 455. The rule permitting special damages always presupposes that the injured party has used reasonable diligence to protect himself from avoidable consequences after discovery of a defect, and to hold otherwise would be to construe a contract of warranty one of insurance. Cedar Rapids vs Sorague, 203 Ill. App. 424, 429, and 280 Ill. 336; Benjamin Harris and Company vs Western Smelting and Refining Company, 313 Ill. App. 455, 485.

In the case at bar, defendant testified that the cost of replacement of a block assembly, which would eliminate the cracks entirely, was \$100.00 to \$150.00. He had been in the tractor business for many years, and there was no evidence disputing this estimate. Such amount, it would appear, was a reasonable amount to have been expended, if necessary, to prevent plaintiff's loss of crop production. Plaintiff testified that he believed he could have pur-

1212 51.5

chased another tractor. He had no idea of the cost of a new block assembly and did not know if there were any available on the market. Plaintiff had made no effort to have a mechanic examine the tractor to determine the cause of the loss of power or to make any adjustments or repair. The evidence does not show why the plaintiff could not have had his entire acreage fall plowed. It shows no attempt on his part to repair the tractor or find another one. The testimony was very unsatisfactory as to any claim that the plaintiff makes that he has been damaged 750 bushels of corn because 50 acres of his land was not "fall plowed". It fails to show what arrangement plaintiff had for the division of crops since he was a tenant farmer. The court apparently gave the plaintiff credit for one half the crop loss claimed when the record fails to show whether he operated on the share crop basis or paid cash rent. The plaintiff claimed furthermore that because the tractor did not work, he was greatly delayed in his farming operations the next spring, and was required to hire a man to plant his corn and help to cultivate it. The plaintiff was allowed \$87 and \$55 for these items. We believe such allowance to be speculative and conjectural and unwarranted. The burden was upon the plaintiff to produce evidence on the subject of damages upon which a decision could be rendered without guess or speculation.

The court saw and heard the witnesses and was in a better position than a reviewing court to evaluate the credibility of their testimony. He reached the conclusion that plaintiff was entitled to the relief sought with respect to the breach of warranty and the return of \$300 downpayment, and we are not in a position to determine that such finding was contrary to the manifest weight of the evidence. We are of the opinion that the ends of justice will be best served if we, rather than order a retrial of the cause, direct that the finding of the trial court be sustained with respect to the cancellation of note and mortgage executed by the plaintiff, and that the \$300 downpayment be returned to plaintiff, and reversed with respect to the damages allowed.

Cause is therefore reversed and remanded with directions to trial court to enter a decree in accordance with this determination.

chased another tractor. He had no idea of the cost of a new block assembly and did not know if there were any available on the market. Plaintiff had made no effort to have a mechanic examine the tractor to determine the cause of the loss of power or to make any adjustments or repairs. The evidence does not show why the plaintiff could not have had his engine acrossed full power. It shows no attempt on his part to repair the tractor or find another one. The testimony was very unsatisfactory as to any claim that the plaintiff makes that he has been damaged 700 dollars of corn because 60 acres of his land was not "all plowed". It fails to show what arrangement plaintiff had for the division of crops since he was a tenant farmer. The court apparently gave the plaintiff credit for one half the crop loss claimed when the record fails to show whether he operated on the share crop basis or paid cash rent. The plaintiff claimed the tractor was not because the tractor did not work, he was greatly delayed in his farming operations the next spring, and was required to place a man to plant his corn and help to cultivate it. The plaintiff was allowed 700 and 1/2 for these items. We believe such allowance to be speculative and conjectural and unwarranted. The burden was upon the plaintiff to produce evidence on the subject of damages upon which a verdict could be rendered without guess or speculation. The court saw and heard the witnesses and was in a better position than a reviewing court to evaluate the credibility of their testimony. It reached the conclusion that plaintiff was entitled to the relief sought with respect to the breach of warranty and the return of \$100 downpayment, and he was not in a position to determine that such finding was contrary to the manifest weight of the evidence. It is of the opinion that the ends of justice will be best served if we, rather than order a reversal of the cause, direct that the finding of the trial court be sustained with respect to the cancellation of note and mortgage executed by the plaintiff, and that the \$100 downpayment be returned to plaintiff, and reversed with respect to the damages allowed. Cause is therefore reversed and remanded with direction to trial court to enter a decree in accordance with this determination.

43735

IN RE ESTATE OF HARRIS KATZ,
Deceased.

IRWIN KATZ, Executor of the
Will of Harris Katz, Deceased,
Appellant,

v.

CLAIM OF BUICK & GUILD and CARL
M. PEDERSEN & CO.,
Appellees.

329 I.A. 442
APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Irwin Katz, executor of the estate of Harris Katz, deceased, seeks to reverse an order of the Circuit court of Cook county allowing the claim of "Carl M. Pedersen and Co. and Buick and Guild" for \$1250.

The record discloses that on the 6th day of September, 1944, Bruce R. Guild filed a claim in the Probate court of Cook county for \$1250 in the matter of the estate of Harris Katz, deceased, in which he swore that he was "one of the claimants and as agent for others;" that the "\$1,250 is due to Buick & Guild and Carl M. Pedersen & Co., real estate brokers, for services rendered in procuring a contract for the purchase of the premises commonly known as 2208-2210 North Kedzie Avenue, Chicago, Illinois, consisting of a 6-flat apartment building, for \$25,000.00, which building was owned by the decedent."

November 24, 1944, the Probate court entered an order disallowing the claim and Bruce R. Guild prayed and was allowed an appeal to the Circuit court of Cook county upon giving bond for \$250.00 within 20 days. He filed the bond which was approved by the Probate court December 11, 1944, and on November 23, 1945,

IN RE ESTATE OF HARRIS LATE,
deceased.

IRWIN LATE, executor of the
Will of Harris late, deceased,
Appellant,

v.

CLARK OF PRICE & GUILD and CARL
H. GREEN & CO.,
Appellees.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

By this appeal Irwin late, executor of the estate of
Harris late, deceased, seeks to reverse an order of the Circuit
Court of Cook County affirming the claim of "Carl H. Green
and Co. and Clark and Guild" for \$250.

The record discloses that on the 23d day of September,
1944, Bruce H. Guild filed a claim in the Probate Court of Cook
County for \$250 in the matter of the estate of Harris late,
deceased, in which he swore that he was "one of the claimants
and as agent for others;" that the "\$250 is due to Clark
Guild and Carl H. Green & Co., real estate brokers, for
services rendered in procuring a contract for the purchase of
the premises commonly known as 2508-2510 North Kedzie Avenue,
Chicago, Illinois, consisting of a 6-flat apartment building,
for \$25,000.00, which building was owned by the decedent."

November 22, 1944, the Probate Court entered an order dis-
allowing the claim and Bruce H. Guild prayed and was allowed
an appeal to the Circuit Court of Cook County upon giving bond
for \$250.00 within 20 days. He filed the bond which was approved
by the Probate Court December 11, 1944, and on November 22, 1944,

2.

the Circuit court entered the order appealed from, in which it was recited that a jury was waived and the court heard the evidence.

The evidence, in substance, shows that some time in January, 1944, Alexander Brzezinski, a real estate broker, employed by Carl M. Pedersen and Co., one of the claimants, in response to a telephone call from Harris Katz, went to see Mr. Katz, who lived in the building in question; that Katz told him he wanted to sell the property for \$25,000. Brzezinski further testified that shortly thereafter he got in touch with Mr. Guild, one of the other claimants, who was a real estate broker and a couple of days thereafter, Guild informed him that he had a buyer for the property; that he called Mr. Katz and told him all of these facts and the next day he and Mr. Guild and the prospective purchaser, Sidney J. Owitz, called on Mr. Katz in his apartment and the parties then examined part of the building. That the witness then asked Mr. Katz what he wanted for the property and he replied: "\$25,000 and nothing less." That after they left Katz, Mr. Owitz went with Guild to the latter's office and the next day the witness received a contract for the sale and purchase of the property which was signed by Mr. Owitz; that the witness telephoned Mr. Katz and wanted to know when he could call and have the contract signed and that Katz replied he had to talk with his sons before he would sign the contract and that if the contract was all right he would sign it. Pursuant to this conversation they went to Katz's home as requested, on the following Sunday; that Katz's son, Milton, was there and looked over the contract and said that so far as he could see, it was all right and that he would have to talk to his brother and see what they were going to do with the father in case the property was sold. The witness further testified that the next day, not having heard from Katz, he called

The Circuit court entered the order appealed from, in which it was recited that a jury was waived and the court heard the evidence.

The evidence, in substance, shows that some time in January, 1944, Alexander Brzezinski, a real estate broker, employed by Carl A. Peterson and Co., one of the claimants, in response to a telephone call from Harry Katz, went to see Katz, who lived in the building in question; that Katz told him he wanted to sell the property for \$25,000. Brzezinski further testified that shortly thereafter he got in touch with Mr. Guild, one of the other claimants, who was a real estate broker and a couple of days thereafter, Guild informed him that he had a buyer for the property; that he called Mr. Katz and told him all of these facts and the next day he and Mr. Guild and the prospective purchaser, Sidney J. Davis, called on Mr. Katz in his apartment and the parties then examined part of the building. That the witness then asked Mr. Katz what he wanted for the property and he replied: "\$25,000 and nothing less." That after the Katz left, Mr. Davis went with Guild to the latter's office and the next day the witness received a contract for the sale and purchase of the property which was signed by Mr. Davis; that the witness telephoned Mr. Katz and wanted to know when he could call and have the contract signed and that Katz replied he had to talk with his sons before he would sign the contract and that if the contract was all right he would sign it. Pursuant to this conversation they went to Katz's home as requested, on the following Sunday; that Katz's son, Milton, was there and looked over the contract and said that so far as he could see, it was all right and that he would have to talk to his brother and see what they were going to do with the matter in case the property was sold. The witness further testified that the next day, not having heard from Katz, he called

3.

Irwin Katz, another son, and that the son said as soon as they had a place for his father they were ready to let him sign the contract; that "After two or three weeks I couldn't do anything with them so I told Mr. Guild to return the deposit" the prospective purchaser had made of \$1250. That after Mr. Katz passed away (March 27, 1944) "we entered into another contract with Irwin Katz, Executor, which contract was signed by Mr. Owitz." On cross examination he testified that Katz asked what the commission would be and he said the regular 5%; that the deposit was made at Mr. Guild's office; that the contract was never signed by Katz or his sons; that the second contract was made after the death of Mr. Katz and was for the same property and for the same amount but it was not signed by either of the parties but initialed by Mr. Owitz; that Pedersen and Co. were real estate brokers and had a license for 1943 and 1944 and that they had been in business for 35 years.

Bruce R. Guild, called by claimants, testified that he was connected in the real estate department of Buick & Guild; "I am one of the claimants in this case." On cross examination he said that in the year 1944 he did not have a city real estate broker's license; that he could not tell whether the firm of Buick & Guild had one; that Buick had a state license.

Morton Katz, called as a witness on behalf of the estate, testified that he was a son of Harris Katz who died in March, 1944; that about 60 days before his father died he told Mr. Brzezinski that his father was very ill at the time and that his father had told him that because he was not well, they could not get together on the deal; that he further told Mr. Brzezinski that as long as his father was alive the building would not be sold; that Mr. Brzezinski replied that if they could get together, to call him on the telephone and let him know; that after the father died Mr. Brzezinski called him and the witness told him that the heirs could not get together and that Brzezinski

told him that the heirs could not get together and that Brzezinski
 after the father died Mr. Brzezinski called him and the witness
 together, to call him on the telephone and let him know; that
 said; that Mr. Brzezinski replied that if they could get
 that as long as his father was alive the building would not be
 set together on the deal; that he further told Mr. Brzezinski
 father had told him that because he was not well, they could not
 Brzezinski that his father was very ill at the time and that his
 1944; that about 60 days before his father died he told Mr.
 testified that he was a son of Maria Kats who died in March,
 Morton Kats, called as a witness on behalf of the estate,
 Boick & Guild had one; that Guild had a state license.
 broker's license; that he could not tell whether the firm of
 he said that in the year 1944 he did not have a city real estate
 "I am one of the claimants in this case." On cross examination
 was connected in the real estate department of Boick & Guild;
 Bruce H. Guild, called by claimants, testified that he
 had been in business for 35 years.
 estate brokers and had a license for 1942 and 1944 and that they
 but initiated by Mr. O'Neil; that Pedersen and Co. were real
 for the same amount but it was not signed by either of the parties
 after the death of Mr. Kats and was for the same property and
 signed by Kats on his part; that the second contract was made
 was made at Mr. Guild's office; that the contract was never
 commission would be and he said the regular fee; that the deposit
 On cross examination he testified that Kats asked what the
 with Irwin Kats, executor, which contract was signed by Mr. O'Neil.
 passed away (March 27, 1944) "we entered into another contract
 prospective purchaser had made of \$1000. That after Mr. Kats
 with them so I told Mr. Guild to return the deposit" the pro-
 contract; that "After two or three weeks I couldn't do anything
 had a place for his father they were ready to let him sign the
 Irwin Kats, another son, and that the son said as soon as they

4.

replied: "if you do get together call me and we will go through with the deal."

The two contracts are in the record and are the usual, printed contracts to be filled out, as they were, in typewriting. The first was dated January 29, 1944 and is between Sidney J. Owitz, a bachelor and Harris Katz, a widower. It recites that Owitz had paid \$1250 as earnest money and when the deal was consummated agreed to pay the balance, \$23,750, at the office of "Buick & Guild, 3135 N. Cicero Ave. Chicago," upon delivery of the deed. That the contract and earnest money should be held by Buick & Guild. The following also appears in typewriting: "Real estate commission to be equally divided between Buick & Guild and Carl M. Pedersen & Co."

The second contract is dated April 12, 1944 but is not signed by either party. It recites the payment of \$1250 earnest money which was to be held by Buick & Guild and the balance of \$23,750 to be paid in cash at the time of the delivery of the deed. Sidney J. Owitz is named as purchaser and "Irwin Katz, Executor of the Estate of Harris Katz, Deceased" as the seller. That "The Estate of Harris Katz, Deceased, is now pending in the Probate Court of Cook County, *** the sale being subject to the approval of the Probate Court." That contract further recites that the earnest money shall be held by Percy Wilson Mortgage & Finance Corp., and that "Real Estate commission to be equally divided between Buick & Guild and Carl M. Pedersen & Co."

On the hearing it was agreed that if the estate within 30 days could show that Buick & Guild had no license from the city as real estate brokers, this fact might be shown although the court held it would be immaterial for the reason that the claimants were seeking to recover on their claim for commission which the court held to be valid and binding. This is the contention made by the claimants. We are unable to agree with this

replied: "If you do get something call me and we will go through with the deal."

Two contracts are in the record and are the usual printed contracts to be filled out, as they were, in type-writing. The first was dated January 20, 1944 and is between Sidney J. Owitz, a bachelor and Harris Katz, a widower. It recites that Owitz had paid \$1500 as earnest money and when the deal was consummated agreed to pay the balance, \$21,750, at the office of "Euler & Guild, 2133 N. Cicero Ave. Chicago," upon delivery of the deed. That the contract and earnest money should be held by Euler & Guild. The following also appears in typewriting: "Real estate commission to be equally divided between Euler & Guild and Carl M. Pedersen & Co."

The second contract is dated April 12, 1944 but is not signed by either party. It recites the payment of \$1500 earnest money which was to be held by Euler & Guild and the balance of \$21,750 to be paid in cash at the time of the delivery of the deed. Sidney J. Owitz is named as purchaser and "Harris Katz, Executor of the Estate of Harris Katz, deceased" as the seller. That "the estate of Harris Katz, deceased, is now pending in the Probate Court of Cook County, Illinois, the sale being subject to the approval of the Probate Court." That contract further recites that the earnest money shall be held by Percy Wilson, Trustee & Finance Corp., and that "Real estate commission to be equally divided between Euler & Guild and Carl M. Pedersen & Co."

On the hearing it was agreed that if the estate within 30 days could show that Euler & Guild had no lien from the city as real estate brokers, this fact might be shown although the court held it would be immaterial for the reason that the claimants were seeking to recover on their claim for commission which the court held to be valid and binding. This is the contention made by the claimants. It was unable to agree with this

5.

contention. We think the proposed original contract was not a binding obligation and that both parties agreed to this fact. This is shown by the fact that the \$1250 deposit made by Owitz was returned to him by Buick & Guild and by the further fact that the parties sought afterwards to enter into a contract with the estate. And it was typewritten in each contract that the real estate commission was to be equally divided between Buick & Guild and Pedersen & Co. Moreover, on the hearing counsel for claimants said "the claim is by Carl M. Pedersen and Company and Buick and Guild" and the order or judgment appealed from recites that "On hearing of the claim of Carl M. Pedersen and Co. and Buick and Guild, ***filed against the above estate of Harris Katz, deceased," it was allowed for \$1250. The claim was not allowed as the claim of Carl M. Pedersen & Co. Buick & Guild admittedly not having obtained a license from the city of Chicago to act as real estate brokers, they cannot recover. The ordinance provides, Sec. 23: "It shall be unlawful for any person to engage in the business of, or to act in, the capacity of a real estate broker without having obtained a license so to do." And by Sec. 29: "No person shall pay any commission or other compensation to any person for negotiating contracts of real estate other than to real estate brokers licensed under this chapter." (Ch. 113, Municipal Code of Chicago,) Douthart v. Congdon, 197 Ill. 349; Hendricks v. Richardson, 233 Ill. App. 130; Rheinberger v. Sec. Life Ins. Co. of America, 47 Fed. Supp. 196. This has been repeatedly held by our Supreme and Appellate Courts to be the law, and counsel for the claimants do not contend to the contrary.

For the reasons stated, the order or judgment appealed from is reversed.

ORDER OR JUDGMENT REVERSED.

Niemeyer and Feinberg, J. J., concur.

condition. We think the proposed original contract was not a binding obligation and that both parties agreed to this fact. This is shown by the fact that the \$1000 deposit made by Oyster was returned to him by Bulck & Guild and by the further fact that the parties sought afterwards to enter into a contract with the estate. And it was typewritten in each contract that the real estate commission was to be equally divided between Bulck & Guild and Pedersen & Co. However, on the hearing counsel for claimants said "the claim is by Carl E. Pedersen and George and Bulck and Guild" and the order or judgment appealed from recites that "On hearing of the claim of Carl E. Pedersen and George and Bulck and Guild, filed against the above estate of Martin Katz, deceased," it was allowed for \$1000. The claim was not allowed on the claim of Carl E. Pedersen & Co. Bulck & Guild admittedly not having obtained a license from the city of Chicago to act as real estate brokers, they cannot recover. The ordinance provides, Sec. 23: "It shall be unlawful for any person to engage in the business of, or to act in, the capacity of a real estate broker without having obtained a license as to do," and by Sec. 23: "a person shall pay any commission or other compensation to any person for negotiating contracts of real estate other than to real estate brokers licensed under this chapter." (Ch. 118, Municipal Code of Chicago.) Booth v. Gordon, 197 Ill. 348; Wendricks v. Richardson, 243 Ill. 404; Richardson v. Sec. Life Ins. Co. of Chicago, 47 Fed. 2d 198. This has been repeatedly held by our Supreme and Appellate Courts to be the law, and counsel for the claimants do not contend to the contrary.

For the reasons stated, the order or judgment appealed from is reversed.

ORDER ON JUDGMENT REVERSED.

Kieswyer and Feldman, J. J., concur.

43756-43757

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

GERALD L. K. SMITH,
Plaintiff in Error.

Consolidated With

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

DON LOHBECK,
Plaintiff in Error.

329 I.A. 442²
WRIT OF ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 8, 1946, Gerald L. K. Smith was found guilty of a direct contempt of court and sentenced to be confined in the County Jail for a term of 60 days. Don Lohbeck, on the 12 of April, 1946, was found guilty of a direct contempt of court and sentenced to be confined in the County Jail for 30 days. A writ of error was sued out by each defendant from this court and the cases were consolidated on one set of abstracts and briefs.

In the Smith case the order entered April 8, 1946, recites that the matter came on to be heard on motion of The People for an order finding defendant, Gerald L. K. Smith guilty of direct contempt of court "by reason of his having aided, abetted and caused to be circulated by one Don Lohbeck certain documents or papers otherwise known as 'press releases' in the courtroom of the Honorable John V. McCormick" one of the Judges of the Municipal court of Chicago sitting in Room 1114 City Hall, Chicago, while the case entitled "City of Chicago vs. Arthur W. Terminiello" was being heard before Judge McCormick and a jury and that the documents or papers "contain malicious and defamatory statements

4375C-4375V

THE PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in Error,

v.

GERALD L. K. SMITH,
Plaintiff in Error.

Consolidated with

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

DON LOHBECK,
Plaintiff in Error.

WRIT OF HABEAS CORPUS
MUNICIPAL COURT
OF CHICAGO.

THE PRESIDING JUDGE'S DECISION DELIVERED THE OPINION OF THE COURT.

April 8, 1948, Gerald L. K. Smith was found guilty of a direct contempt of court and sentenced to be confined in the County Jail for a term of 60 days. Don Lohbeck, on the 12 of April, 1948, was found guilty of a direct contempt of court and sentenced to be confined in the County Jail for 30 days. A writ of error was issued out by each defendant from this court and the cases were consolidated on one set of abstracts and briefs.

In the Smith case the order entered April 8, 1948, recites that the matter came on to be heard on motion of The People for an order finding defendant, Gerald L. K. Smith guilty of direct contempt of court "by reason of his having aided, abetted and caused to be circulated by one Don Lohbeck certain documents or papers otherwise known as 'press releases' in the courtroom of the Honorable John V. McCormack, one of the Judges of the Municipal Court of Chicago sitting in Room 1114 City Hall, Chicago, while the case entitled "City of Chicago vs. Arthur W. Terminallo" was being heard before Judge McCormack and a jury and that the documents or papers "contain malicious and defamatory statements

2.

purporting to be an obstruction of justice and an abuse of the processes of the Municipal Court of the City of Chicago, and in manifest pursuance of a scheme to interfere with the orderly processes of" the Municipal court, "all in disrespect and in derogation of the authority and dignity of the Municipal Court." Continuing the order finds that on March 28, 1946, Smith aided and abetted and caused to be circulated by defendant, Don Lohbeck, certain papers known as "press releases" in the courtroom of Judge McCormick, in which there was a statement relative to the "Terminiello-Kister-Smith trials in the City Hall, Chicago" which tended to be in disrespect of the prosecution of the Terminiello case which was then on trial before Judge McCormick and a jury and particularly during the morning recess while the judge and the attorneys were in chambers discussing objections, motions and other matters pertaining to the Terminiello case on trial. That the statements released are made a part of the order and that these four statements were given to the court during the noon recess; that immediately upon receipt of them by Judge McCormick he convened court and a hearing was held pertaining to the issuance and distribution of the 4 releases. That Smith was present and represented by counsel. Witnesses were heard and further evidence introduced.

The evidence is in the record and is made a part of the order by reference, for greater certainty. The court further finds that the distribution of the papers purporting to be "press releases" constituted an obstruction of the justice and abuse of the processes of the court and took place while the court was in session. That Smith was present at the time of the contempt hearing and it was adjudged that he was guilty of contempt of court for aiding, abetting and causing Don Lohbeck to distribute papers in the courtroom while the case of "City of Chicago vs. Terminiello" was on trial. Smith was adjudged

purporting to be an obstruction of justice and an abuse of the processes of the Municipal Court of the City of Chicago, and in manifest pervasiveness of a scheme to interfere with the orderly processes of "the Municipal court," all in disregard and in derogation of the authority and dignity of the Municipal Court." Containing the order finds that on March 28, 1948, Smith aided and abetted and caused to be circulated by defendant, Don Lohbeck, certain papers known as "press releases" in the courtroom of Judge McCormick, in which there was a statement relative to the "Terminello-Kister-Smith trials in the City Hall, Chicago," which tended to be in disrespect of the prosecution of the Terminello case which was then on trial before Judge McCormick and a jury and particularly during the morning recess while the judge and the attorneys were in chambers discussing objections, motions and other matters pertaining to the Terminello case on trial. That the statements released are made a part of the order and that these four statements were given to the court during the noon recess; that immediately upon receipt of them by Judge McCormick he convened court and a hearing was held pertaining to the issuance and distribution of the 4 releases. That Smith was present and represented by counsel. Witnesses were heard and further evidence introduced. The evidence is in the record and is made a part of the order by reference, for greater certainty. The court further finds that the distribution of the papers purporting to be "press releases" constituted an obstruction of the justice and abuse of the processes of the court and took place while the court was in session. That Smith was present at the time of the contempt hearing and it was adjudged that he was guilty of contempt of court for aiding, abetting and causing Don Lohbeck to distribute papers in the courtroom while the case of "City of Chicago vs. Terminello" was on trial. Smith was adjudged

3.

guilty of a direct contempt of court and sentenced to jail for 60 days. The 4 statements or "press releases" are in the record and are made a part of the order adjudging Smith to be in contempt of court.

One copy of the statement of March 27 was given to a newspaper reporter in the courtroom shortly before the court convened in regular morning session and 3 copies of the statement of March 28 were handed out to 3 newspaper representatives while the court was in session and in chambers with the counsel in the case.

As above stated, upon the court's attention being called to the fact that the statements had been distributed in the courtroom, there was a hearing before the court as to whether Smith, Lohbeck and Frederick Kister should be found guilty of a direct contempt of court and punished. Kister was found to be not guilty and was discharged.

There is no dispute in the evidence as to what Smith and Lohbeck did. Smith, on the hearing, admitted that he had dictated the 2 statements and Lohbeck testified that he handed the one of March 28th to 3 newspaper representatives in the courtroom while the judge and attorneys were in chambers, as above stated. On the hearing counsel for Smith said: "Mr. Smith will assume all responsibility for the dictation, preparation, release and passing out, wherever and at the time they were passed out."

Smith testified that he was editor and publisher of "The Cross and Flag" a monthly publication; that he also published a weekly letter called "The Washington Letter" and also a weekly National News Service which served 230 journals; that "I am president of the America First Party, a legal political party. I have been giving out releases for about ten years. I recognize

guilty of a direct contempt of court and sentenced to jail for 60 days. The 4 statements or "press releases" are in the record and are made a part of the order adjudging Smith to be in contempt of court.

One copy of the statement of March 27 was given to a newspaper reporter in the courtroom shortly before the court convened in regular morning session and 3 copies of the statement of March 28 were handed out to 3 newspaper representatives while the court was in session and in chambers with the counsel in the case.

As above stated, upon the court's attention being called to the fact that the statements had been distributed in the courtroom, there was a hearing before the court as to whether Smith, Lohbeck and Frederick Kister should be found guilty of a direct contempt of court and punished. Kister was found to be not guilty and was discharged.

There is no dispute in the evidence as to that Smith and Lohbeck did. Smith, on the hearing, admitted that he had dictated the 2 statements and Lohbeck testified that he handed the one of March 28th to 3 newspaper representatives in the courtroom while the judge and attorneys were in chambers, as above stated. On the hearing counsel for Smith said: "Mr. Smith will assume all responsibility for the dictation, preparation, release and passing out, whenever and at the time they were passed out."

Smith testified that he was editor and publisher of "The Gross and Flag" a monthly publication; that he also published a weekly letter called "The Washington Letter" and also a weekly National News Service which served 230 journals; that "I am president of the American First Party, a legal political party. I have been giving out releases for about ten years. I recognize

4.

the two releases introduced into evidence. I dictated both of them and authorized their distribution by my employees. I did not tell them where they were to release them; I specified however that they not be distributed during the court session. I don't know if I was present when these releases were distributed. I don't think I saw these releases handed out to the persons named today in the courtroom." That before the releases were given out he did not submit them to his counsel; that when he dictated the statement of March 27, in which, after referring to a certain individual, it is said "he [the individual] collaborated with certain judges and pro-Communists and agitators in advance of the meeting," he (Smith) did not have in mind Judge McCormisk. Smith further testified that he was in court on the 27 and 28 of March, arriving there about 9:30 o'clock in the morning.

Counsel for defendants say that in the Smith matter an order was entered by the clerk of the court on April 8, 1946, which was not signed by the judge and on the same day a draft order signed by the judge was entered, and counsel contend that "The real order of the court is the order entered by the clerk of the court and not the draft order." There is no merit in this contention. There is no substantial difference between the two orders. The first order, which was not signed by the judge, was not entered by the clerk, the clerk does not enter orders except as he is told to do so by the court. In the second order, two statements made by Smith on the 27 and 28 of March are physically attached to and made a part of the order, designated as Exhibits 1, 2, 3 and 4, three copies of the latter statement being distributed in the courtroom and but one copy of the statement of March 27. In the unsigned order these 4 exhibits "are by reference incorporated in this order and made a part hereof for greater certainty," so that there is no substantial

the two releases introduced into evidence. I dictated both of them and authorized their distribution by my employees. I did not tell them where they were to release them; I specified however that they not be distributed during the court session. I don't know if I was present when these releases were distributed. I don't think I saw these releases handed out to the persons named today in the courtroom. That before the releases were given out to me I did not submit them to his counsel; that when he dictated the statement of March 27, in which, after referring to a certain individual, it is said "he [the individual] collaborated with certain judges and pro-Communist agitators in advance of the meeting," he (Smith) did not have in mind Judge McGowan. Smith further testified that he was in court on the 27 and 28 of March, arriving there about 9:30 o'clock in the morning.

Counsel for defendants say that in the Smith matter an order was entered by the clerk of the court on April 8, 1946, which was not signed by the judge and on the same day a draft order signed by the judge was entered, and counsel contend that "The real order of the court is the order entered by the clerk of the court and not the draft order." There is no merit in this contention. There is no substantial difference between the two orders. The first order, which was not signed by the judge, was not entered by the clerk, the clerk does not enter orders except as he is told to do so by the court. In the second order, two statements made by Smith on the 7 and 28 of March are physically attached to and make a part of the order, designated as Exhibits 1, 2, 3 and 4, three copies of the latter statement being distributed in the courtroom and but one copy of the statement of March 27. In the unsigned order these 4 exhibits are by reference incorporated in this order and make a part hereof for greater certainty," so that there is no substantial

5.

difference in the two orders. Counsel further contend that "The orders adjudging plaintiffs in error in contempt should have recited the allegedly offensive matter verbatim." There is no merit in this contention. The order signed by the judge expressly incorporated the evidence introduced by reference as a part of the order. But under the law as announced by our Supreme court in In re Estate of Kelly, 365 Ill. 174, it was entirely proper to consider the evidence whether or not it was incorporated in the order by reference.

It is also contended by counsel for defendants that "The contempt, if any, was indirect, or constructive, and not direct." This point is equally without merit. In re Estate of Kelly, 365 Ill. 174; People v. Andalman, 346 Ill. 149.

Counsel further contend that "The 'press release' cannot be made the basis for any contempt judgment; they do not contain malicious and defamatory statements nor any statement tending to obstruct justice or abuse the processes of the court." Under the facts as disclosed by the record, however, there is merit in this contention; we think the statements or releases did not tend to obstruct the administration of justice. There is nothing in the record to show what Terminiello was being tried for. Nor is there any showing as to whether there was another suit pending against Kister and Smith or either or both of them except in the statements made by Smith, and which were released in the courtroom. In the statement of March 28 it is said that Ira Latimer, instead of being used as a star witness by the City of Chicago, should be, and was probably under surveillance by proper government authorities. Who Ira Latimer was, or what he had to do with the case on trial, or any other case, nowhere appears. Whether he was called as a witness in the Terminiello case, then on trial, or was expected to be called on that trial or any other trial does not appear. Moreover, there is nothing

difference in the two orders. Counsel further contend that "The orders adjudging plaintiffs in error in contempt should have recited the allegedly offensive matter verbatim." There is no merit in this contention. The order signed by the Judge expressly incorporated the evidence introduced by reference as a part of the order. But under the law as announced by our Supreme Court in In re Estate of Kelly, 365 Ill. 174, it is entirely proper to consider the evidence whether or not it was incorporated in the order by reference.

It is also contended by counsel for defendants that "The contempt, if any, was indirect, or constructive, and not direct." This point is equally without merit. In re Estate of Kelly, 365 Ill. 174; People v. Anderson, 348 Ill. 149.

Counsel further contend that "the 'press release' cannot be made the basis for any contempt judgment; they do not contain malicious and defamatory statements nor any statement tending to obstruct justice or abuse the processes of the court." Under the facts as disclosed by the record, however, there is merit in this contention; we think the statements or releases did not tend to obstruct the administration of justice. There is nothing in the record to show what terminals are being tried for.

Now is there any showing as to whether there was another suit pending against Latimer and Smith or either or both of them except in the statements made by Smith, and which were released in the courtroom. In the statement of March 28 it is said that Mrs. Latimer, instead of being used as a star witness by the City of Chicago, should be, and was probably under surveillance by proper government authorities. No Mrs. Latimer was, or was to be, called as a witness in the trial, or any other trial, or as expected to be called on that trial case, then on trial, or as expected to be called on that trial or any other trial has not appear. Moreover, there is nothing had to do with the case on trial, or any other case, nowhere appears. Neither was called as a witness in the Terminal case, then on trial, or as expected to be called on that trial or any other trial has not appear. Moreover, there is nothing

u.

in the record to show that the members of the jury or anyone except the 4 newspaper persons to whom the statements were handed knew anything about the passing, or the contents of them, or any part of them. And we certainly cannot assume that they would affect Judge McCormick in the trial of the Terminiello case then on hearing. We know that Judge McCormick would not be swayed one way or the other after he read the statements.

In passing on a somewhat similar question in Schenck v. United States, 249 U. S. 47, the Supreme court speaking by Mr. Justice Holmes said (p. 52): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about" a substantial interference with the ordinary administration of justice. And in Bridges v. California, 314 U. S. 252, the court speaking by Mr. Justice Black said (p.263): "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." This rule was again announced by the Supreme court of the United States in reversing the Supreme court of the State of Florida in Pennekamp v. Florida, opinion No. 473, filed June 3, 1946.

The judgments of the Municipal Court of Chicago are reversed.

JUDGMENTS REVERSED.

Niemeyer and Feinberg, J. J., concur.

in the record to show that the members of the jury or anyone except the newspaper persons to whom the statements were handed knew anything about the passing, or the contents of them, or any part of them. And we certainly cannot assume that they would affect Judge McCormick in the trial of the Terminiello case then on hearing. We know that Judge McCormick would not be swayed one way or the other after he read the statements.

In passing on a somewhat similar question in Schenck v.

United States, 249 U. S. 47, the Supreme Court speaking by

Mr. Justice Holmes said (p. 52): "The question in every case

is whether the words used are used in such circumstances and are

of such a nature as to create a clear and present danger that

they will bring about 'a substantial interference with the ordinary

administration of justice'. And in Whitney v. California, 244

U. S. 358, the court speaking by Mr. Justice Brandeis said (p. 363):

"What finally emerges from the 'clear and present danger' cases

is a working principle that the substantive evil must be extremely

serious and the degree of imminence extremely high before

utterances can be punished." This rule was again announced by the

Supreme Court of the United States in reversing the Supreme

court of the State of Florida in Pennington v. Florida, opinion

No. 473, filed June 3, 1932.

The judgments of the Municipal Court of Chicago are

reversed.

WILLIAM H. HARRIS, JR.

Attorney at Law, Chicago, Ill.

43765

FANNIE MAY SCOVILLE,
Appellee,

v.

THOMAS PAPER STOCK CO.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

329 I.A. 43

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer against defendant to recover possession of a part of a three-story building located at the northwest corner of Evergreen avenue (formerly Rees street) and Kingsbury street, approximately 92 x 188 feet in size. The case was tried by the court without a jury and a finding and judgment were entered in plaintiff's favor. Defendant appeals.

The record discloses that a written lease was executed by the parties June 25, 1940, by which the premises in question were leased by plaintiff to defendant for a period commencing July 1, 1940 and ending June 30, 1945. June 25, 1945, which was 5 days before the term covered by the lease had expired, plaintiff's agent wrote defendant notifying defendant that plaintiff "the lessor anticipates your vacating the premises upon the expiration of the lease, all in accordance with the provisions and terms thereof, on June 30, 1945." November 23, 1945, plaintiff's attorneys wrote defendant that they were retained by plaintiff to secure for her repossession of the premises covered by the lease, and called attention to the fact that "As a matter of courtesy you were advised by registered letter from the City National

43768

FANNIE MAY LLOYD,
Appellee,

v.

THOMAS LLOYD STOCK CO.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

3251.A.43

MR. PRESIDING JUDGE C'GO. ON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of forcible detainer against defendant to recover possession of a part of a three-story building located at the northeast corner of Evergreen avenue (formerly Reed Street) and Kingsbury Street, approximately 82 x 188 feet in size. The case was tried by the court without a jury and a finding and judgment were entered in plaintiff's favor. Defendant appeals.

The record discloses that a written lease was executed

by the parties June 23, 1940, by which the premises in question were leased by plaintiff to defendant for a period commencing July 1, 1940 and ending June 30, 1945. June 23, 1945, which was 3 days before the term covered by the lease had expired, plaintiff's agent wrote defendant notifying defendant that plaintiff "the lessor anticipates your vacating the premises upon the expiration of the lease, all in accordance with the provisions and terms thereof, on June 30, 1945." November 23, 1945, plaintiff's attorneys wrote defendant that they were retained by plaintiff to secure for her repossession of the premises covered by the lease, and called attention to the fact that "As a matter of courtesy you were advised by registered letter from the City National

2.

Bank and Trust Company of Chicago, as agent for Fannie May Scoville, under date of June 25, 1945, that she expected you to vacate at the end of the term," but that despite the covenants of the lease and the notice of June 25, they were advised that defendant had done nothing towards vacating the premises, and that unless this were done, it would be necessary to institute proceedings.

On the hearing counsel for plaintiff stated that the premises covered by the lease were industrial property; that the lease expired June 30, 1945 and that "There has been no rent accepted since that time," to which counsel for defendant replied: "I think the evidence will probably show that the lease expired last June 30th and rent has been tendered but not accepted. ***

"Of course, there are certain penalty provisions under the lease and if we have to go through to completion of trial, of course, we will make the necessary tender, which is the rent which we, of course, offered to pay." The Court: "Since they never accepted rent after the termination of the lease, their conduct can hardly be construed as approving your tenancy because if they did they would accept rent."

Counsel for defendant in their brief, in stating defendant's theory of the case say: "It is the defendant's theory in this case that it became a hold-over tenant for another year by reason of its continuing possession of the premises after the expiration of its lease, with the implied consent of the plaintiff for a period of approximately five months. It is the defendant's theory that the defendant holding over after the termination of its lease became either a trespasser or a hold-over tenant for another year at the option of the plaintiff. It is the defendant's theory that the plaintiff having failed to demand possession of the

Bank and Trust Company of Chicago, as agent for Fannie May Scoville, under date of June 25, 1945, that she expected you to vacate at the end of the term," but that despite the covenants of the lease and the notice of June 25, they were advised that defendant had done nothing towards vacating the premises, and that unless this were done, it would be necessary to institute proceedings.

In the hearing counsel for plaintiff stated that the premises covered by the lease were industrial property; that the lease expired June 30, 1945 and that "There has been no rent accepted since that time," to which counsel for defendant replied: "I think the evidence will probably show that the lease expired last June 30th and rent has been tendered but not accepted." **

"Of course, there are certain penalty provisions under the lease and if we have to go through to completion of trial, of course, we will make the necessary tender, which is the rent which we, of course, offered to pay." The Court: "Since they never accepted rent after the termination of the lease, their conduct can hardly be construed as approving your tender because if they did they would accept rent."

Counsel for defendant in their brief, in stating defendant's theory of the case say: "It is the defendant's theory in this case that it became a hold-over tenant for another year by reason of its continuing possession of the premises after the expiration of its lease, with the implied consent of the plaintiff for a period of approximately five months. It is the defendant's theory that the defendant holding over after the termination of its lease became either a trespasser or a hold-over tenant for another year at the option of the plaintiff. It is the defendant's theory that the plaintiff having failed to demand possession of the

3.

premises within a reasonable time after the expiration of the lease constituted an assent to the defendant holding over." In their reply brief, however, they add that the evidence fails to show the rent was not paid and accepted by plaintiff. There is no merit in this latter contention as appears from what we have above quoted which took place during the trial. Counsel for plaintiff say that where a tenant holds over after the expiration of the term covered by the lease without paying rent or otherwise acknowledging the continuance of the tenancy he becomes either a trespasser or a tenant at the option of the landlord, and that very slight acts on the part of the landlord, or a short lapse of time, are sufficient to show his election to make the occupant his tenant, and a number of cases are cited and discussed. We do not stop to discuss the authorities cited for we are of opinion that they are wholly inapplicable to the facts in the case before us. The lease in the instant case expressly provided that the landlord was not required to serve notice to quit or demand possession before bringing an action of forcible detainer. In the instant case, however, where the term covered by the lease had terminated, no notice was required whether there was such a provision in the lease or not. We think it clear that under the facts as disclosed by the record and all the authorities, defendant was in no sense a hold-over tenant and had no defense to the action. The Cairo & St. Louis R.R. Co. v. The Wiggins Ferry Co., 82 Ill. 230; Condon v. Brockway, 157 Ill. 90; Holtzman v. Goodman, 323 Ill. App. 276 (abst.).

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Niemeyer and Feinberg, J. J., concur.

premises within a reasonable time after the expiration of the lease constituted an assent to the defendant holding over." In their reply brief, however, they add that the evidence fails to show the rent was not paid and accepted by plaintiff. There is no merit in this latter contention as appears from what we have above quoted which took place during the trial. Counsel for plaintiff say that where a tenant holds over after the expiration of the term covered by the lease without paying rent or otherwise acknowledging the continuance of the tenancy he becomes either a trespasser or a tenant at the option of the landlord, and that very slight acts on the part of the landlord, or a short lapse of time, are sufficient to show his election to make the occupant his tenant, and a number of cases are cited and discussed. We do not stop to discuss the authorities cited for we are of opinion that they are wholly inapplicable to the facts in the case before us. The lease in the instant case expressly provided that the landlord was not required to serve notice to quit or demand possession before bringing an action of forcible detainer. In the instant case, however, where the term covered by the lease had terminated, no notice was required whether there was such a provision in the lease or not. We think it clear that under the facts as disclosed by the record and all the authorities, defendant was in no sense a hold-over tenant and had no defense to the action. The Gallo v. St. Louis L. Co. v. The Irving Ferry Co., 82 Ill. 230; Gordon v. Broadway, 187 Ill. 20; Holtzman v. Goodman, 233 Ill. 276 (1907).

The judgment of the municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

43758

REBA L. GOODMAN, now known as
REBA L. DUBELMAN,

Appellant,

v.

EPHRAIM F. GOODMAN,

Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

329 I.A. 444

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from the order of the Superior Court of Cook County, modifying a decree of divorce in favor of plaintiff and against defendant. The order reduced the payment for the support of a minor child (now nine years old) from \$86.00 a month to \$50.00 a month, and denied attorneys' fees to plaintiff for defending the petition of defendant for modification of the decree. She appeals from another order denying the plaintiff an allowance for solicitors' fees and expense of prosecuting this appeal.

The decree of divorce entered November 23, 1942 awarded her the custody of the child, defendant to have the child two summer months each year. It further provided that the allowance for the support of the plaintiff and the minor child was to continue until the defendant was discharged from the United States Army, at which time the court would again fix the amount to be paid in the future to the plaintiff for her support and that of the minor child. The provisions in the decree, with respect to alimony, support of the child and for financial protection of the child, were pursuant to a stipulation signed by the parties and approved by the court. Shortly after the entry of the decree, both plaintiff and defendant remarried,

HERA L. GOODMAN, now known as
HERA L. DUELLMAN,
Appellant,

v.

EMERSON F. GOODMAN,
Appellee.

ALLIANCE
COURT
COOK COUNTY.

3291A 444

MR. JUSTICE FRANKLIN DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from the order of the Superior Court of Cook County, modifying a decree of divorce in favor of plaintiff and against defendant. The order reduced the payment for the support of a minor child (now nine years old) from \$2.00 a month to \$0.00 a month, and denied attorneys' fees to plaintiff for defending the petition of defendant for modification of the decree. The appeals from another order denying the plaintiff an allowance for attorneys' fees and expense of prosecuting this appeal.

The decree of divorce entered November 23, 1942

awarded her the custody of the child, defendant to have the child two summer months each year. It further provided that the allowance for the support of the plaintiff and the minor child was to continue until the defendant was discharged from the United States Army, at which time the court would set in fix the amount to be paid in the future to the plaintiff for her support and that of the minor child. The provision in the decree, with respect to alimony, support of the child and for financial protection of the child, were pursuant to a stipulation signed by the parties and approved by the court. Shortly after the entry of the decree, both plaintiff and defendant remarried,

2.

plaintiff living in New York and defendant in Chicago.

On November 22, 1944, the defendant filed his petition, seeking a modification of the original decree with respect to the custody of the child, in which he alleged that the child was neglected, not properly cared for by the plaintiff; that since the decree he was promoted to the rank of captain in the United States Army, with a base pay of \$200.00 per month, and that his base pay was \$34.00 per month more than he received at the time of the entry of the decree; that he was living in Chicago in a six room apartment, with his second wife, and was well able to look after the interests of the minor child, and that his present wife would be willing to care for the child; that the only reason plaintiff insisted upon custody of the child was to use it as a means of receiving money for support from defendant. He prayed that the decree be modified, giving him full and complete custody of the minor child or, in the alternative, because of the change in circumstances of the parties, the payments for the child's support be reduced.

On February 13, 1945, by leave of court, plaintiff filed an answer to the petition denying that the child was neglected; admitted that since the decree she was employed as a teacher but was not then employed; and that both parties since the decree for divorce had remarried. She asks that an allowance be made for traveling and other expenses in attending the hearing upon the petition for defendant and for solicitors' fees in defense of said petition. She also, on the same day, served notice and filed her petition, alleging his default in the payments provided for in the decree, and though well able to make said payments, defendant has wilfully refused and neglected to do so.

Defendant filed an answer to the latter petition, and on

plaintiff living in New York and defendant in Chicago.

On November 22, 1944, the defendant filed his

petition, seeking a modification of the original decree with

respect to the custody of the child, in which he alleged

that the child was neglected, not properly cared for by the

plaintiff; that since the decree he was promoted to the

rank of captain in the United States Army, with a base pay

of \$200.00 per month, and that his base pay was \$4.00 per

month more than he received at the time of the entry of the

decree; that he was living in Chicago in a six room apartment,

with his second wife, and was well able to look after the

interests of the minor child, and that his present wife would be

willing to care for the child; that the only reason plaintiff

insisted upon custody of the child was to use it as a means of

receiving money for support from defendant. He prayed that the

decree be modified, giving him full and complete custody of the

minor child or, in the alternative, because of the change in

circumstances of the parties, the payments for the child's

support be reduced.

On February 12, 1945, by leave of court, plaintiff filed

an answer to the petition denying that the child was neglected;

admitted that since the decree he was employed as a teacher

but was not then employed; and that both parties since the

decree for divorce had remained. He said that an allowance

be made for traveling and other expenses in attending the

hearing upon the petition of defendant and for solicitor's

fees in defense of said petition. The also, on the same day,

served notice and filed her petition, alleging his default in

the payments provided for in the decree, and though well

able to make said payments, defendant has willfully refused

and neglected to do so.

Defendant filed an answer to the latter petition, and on

3.

March 5, 1945, the matter came on to be heard upon said petitions and answers. An order was entered, which found, among other things, that the defendant had ample means to pay the amount claimed by plaintiff to be due her, and ordered the defendant to pay plaintiff instantler the arrearage of \$344.00, as and for child support, plus \$150.00 attorneys' fees provided for in the order entered October 31, 1944, from which order defendant prayed an appeal. The appeal bond was fixed at \$1200.00, but the appeal was not perfected.

On April 20, 1945, the plaintiff filed another petition, in which she alleged that the defendant failed to comply with the order of March 5, 1945, and was in further default in payments since the last order.

The court, on May 3, 1945, entered an order finding that there was due to the plaintiff a total of \$666.00, consisting of the amount due for the support of the minor child and the \$150.00 solicitors' fees; that the defendant was in receipt of a sufficient income to have properly and promptly complied with the orders of the court but had wilfully refused and neglected so to do, and ordered a writ of attachment to issue.

On May 18, 1945, the court entered an order, reciting that upon the tender and payment by the defendant, in open court, of the amount found to be due in the order of May 3, 1945, the attachment was quashed and all rules to show cause discharged, except with respect to the payment of \$100.00 for attorneys' fees, ordered by the court to be paid on April 27, 1945.

On June 8, 1945, the court entered an order, reciting that by agreement of the parties, the order of May 18th be modified by providing that the said rule to show cause with reference to the \$666.00 due on account of child support and attorneys' fees be discharged, except the \$100.00 order entered on April 27, 1945, for attorneys' fees, and that all rules, motions and the hearing on plaintiff's petitions and

March 5, 1945, the matter came on to be heard upon said petitions and answers. An order was entered, which found, among other things, that the defendant had no means to pay the amount claimed by plaintiff to be due her, and ordered the defendant to pay plaintiff instant the expense of \$344.00, as and for child support, plus \$150.00 attorneys' fees provided for in the order entered October 31, 1944, from which order defendant prayed an appeal. The appeal bond was fixed at \$1200.00, but the appeal was not perfected.

On April 20, 1945, the plaintiff filed another petition, in which she alleged that the defendant failed to comply with the order of March 5, 1945, and was in further default in payments since the last order.

The court, on May 3, 1945, entered an order finding that there was due to the plaintiff a total of \$666.00, consisting of the amount due for the support of the minor child and the \$150.00 solicitors' fees; that the defendant was in receipt of a sufficient income to have properly and promptly complied with the orders of the court but had wilfully refused and neglected so to do, and ordered a writ of attachment to issue.

On May 18, 1945, the court entered an order, reciting that upon the tender and payment by the defendant, in open court, of the amount found to be due in the order of May 3, 1945, the attachment was quashed and all rules to show cause discharged, except with respect to the payment of \$100.00 for attorneys' fees, ordered by the court to be paid on April 27, 1945.

On June 8, 1945, the court entered an order, reciting that by agreement of the parties, the order of May 18th be modified by providing that the said rule to show cause with

reference to the \$666.00 due on account of child support and attorneys' fees be discharged, except the \$100.00 order entered on April 27, 1945, for attorneys' fees, and that all rules, motions and the hearing on plaintiff's petitions and

4.

pleadings be set for hearing on June 22, 1945, and that the motion for plaintiff's reasonable traveling expense to attend the hearing be considered by the judge to whom the case was to be reassigned.

On June 22, 1945, plaintiff filed another petition for a rule to show cause against the defendant, alleging that there was then due \$132.00 under the previous orders for the support of the child, and that there was still due \$100.00 for solicitors' fees under the order of April 27, 1945. A rule to show cause was entered, returnable forthwith.

On June 26, 1945, the court entered an order, reciting "that the parties hereto have agreed with reference to the disposition of the motions now pending before the Court, that the record may be clear in this cause for the future, and that the parties start anew, and that all differences and all communications are settled and held for naught and that the parties resume upon the basis of the following order, otherwise not inconsistent with the decree for divorce." It provided that the minor child be beneficiary in a government insurance policy in the amount of \$10,000.00; that the minor be irrevocable payee of \$800.00 in government bonds, and that defendant deposit with the First National Bank of Chicago \$330.00 in the name of the minor, and the bank book evidencing said deposit be turned over and delivered to the minor upon reaching his majority; that none of said moneys were to be withdrawn in the interim; that the payments of \$86.00 per month for the support and maintenance of said minor child remain in full force and effect, and that said payments have been paid up to June 30, 1945; that the defendant have custody of the child two months each year, the expense of bringing the child from New York to Chicago to be borne equally by the parties, and that during said two month period the defendant be not obligated to pay the \$86.00 per month for the support of the child; that plaintiff was to release her interest as

proceedings be set for hearing on June 22, 1945, and that the motion for plaintiff's reasonable traveling expense to attend the hearing be considered by the judge to whom the case was to be reassigned.

On June 22, 1945, plaintiff filed another petition for a rule to show cause against the defendant, alleging that there was then due \$12.00 under the previous orders for the support of the child, and that there was still due \$100.00 for solicitors' fees under the order of April 27, 1945. A rule to show cause was entered, returnable forthwith.

On June 26, 1945, the court entered an order, reciting "that the parties hereto have agreed with reference to the disposition of the motions now pending before the Court, that the record may be clear in this cause for the future, and that the parties start anew, and that all differences and all communications are settled and held for naught and that the parties resume upon the basis of the following order, otherwise not inconsistent with the decree for divorce." It provided that the

minor child be placed in a government insurance policy in the amount of \$10,000.00; that the minor be irrevocable payee of \$800.00 in government bonds, and that defendant deposit with the First National Bank of Chicago \$350.00 in the name of the minor, and the bank evidencing said deposit be turned over and delivered to the minor upon reaching his majority; that none of said moneys were to be withdrawn in the interim; that the payments of \$80.00 per month for the support and maintenance of said minor child remain in full force and effect, and that said payments have been paid up to June 30, 1945; that the defendant have custody of the child two months each year, the expense of bringing the child from New York to Chicago to be borne equally by the parties, and that during said two month period the defendant be not obligated to pay the \$80.00 per month for the support of the child; that plaintiff was to release her interest as

5.

beneficiary in a \$1,000.00 insurance policy; and that restoration of defendant's rights to the custody of his minor child, set forth in the order, is upon condition that the provisions of the order are fully complied with.

On October 15, 1945, defendant again filed his petition, seeking a modification of the decree with respect to the amount to be paid by him for the support and maintenance of the minor child. He alleged that plaintiff resides in New York; that although he has the rank of captain in the United States Army and is receiving a total of \$352.00 a month, his requirements have increased considerably since the decree, and that he no longer is able to pay the amount for the support of the child, as required by said decree; that there has been a change in the circumstances and conditions of the plaintiff; that she again married; that she has come into the ownership of some real estate in New York, and that her income is greater than his. Leave was given to file the petition, and the plaintiff was ordered to answer.

Plaintiff filed an answer, in which she denied her income was greater; denied that the defendant is not capable of paying the amount required by the decree for the support of the child; that defendant had deliberately defaulted in payments under the decree, requiring her to obtain rules to show cause against him and incurring travel expense for appearance and attorneys' fees, and that defendant pursued such course of action to harass the plaintiff. She also filed a counter petition, alleging that she employed counsel to defend against said petition of defendant, and praying for an order on him to pay a reasonable amount for solicitors' fees.

A hearing upon these petitions and answers, resulted in the entry of an order by the court on November 19, 1945, reducing the amount required to be paid by the decree for the support of the child from \$86.00 per month to \$50.00 per month, and denying

beneficiary in a \$1,000.00 insurance policy; and that restoration of defendant's rights to the custody of his minor child, set forth in the order, is upon condition that the provisions of the order are fully complied with.

On October 18, 1945, defendant again filed his petition,

seeking a modification of the decree with respect to the amount to be paid by him for the support and maintenance of the minor child. He alleged that plaintiff resides in New York; that although he has the rank of captain in the United States Army and is receiving a total of \$32.00 a month, his expenditures have increased considerably since the decree, and that he no longer is able to pay the amount for the support of the child, as required by said decree; that there has been a change in the circumstances and conditions of the plaintiff; that she again married; that she has come into the ownership of some real estate in New York, and that her income is greater than his. Leave was given to file the petition, and the plaintiff was ordered to answer.

Plaintiff filed an answer, in which she denied her income was greater; denied that the defendant is not capable of paying the amount required by the decree for the support of the child; that defendant had deliberately defaulted in payments under the decree, requiring her to obtain rules to show cause against him, and incurring travel expense for appearance and attorneys' fees, and that defendant pursued such course of action to harass the plaintiff. She also filed a counter petition, alleging that she employed counsel to defend against said petition of defendant, and paying for an order on him to pay a reasonable amount for solicitors' fees.

A hearing upon these petitions and answers, resulted in the entry of an order by the court on November 19, 1945, reducing the amount required to be paid by the decree for the support of the child from \$16.00 per month to \$10.00 per month, and denying

6.

plaintiff's petition for the allowance of solicitors' fees, and providing that the reduction operate aunc pro tunc as of October 15, 1945.

On February 13, 1946, plaintiff filed a petition asking an allowance for attorneys' fees and costs to prosecute this appeal totaling \$395.00. On the same day, the court denied the petition.

The court has power under section 18 of the divorce statute from time to time to modify a decree of divorce with respect to the provisions for the payment of alimony and support of a minor child, whenever a material change in circumstances is shown to justify the modification. The burden is upon the one who seeks the modification to show such change. This burden the defendant has not sustained. By his petition filed November 22, 1944, he admitted he was well able financially to support the child and asked that the child's custody be given to him. The court, on March 5, 1945, adjudicated that the defendant had ample means to pay the amount of his arrearage under the decree, and directed him to pay it instante.

By the order of May 18, 1945, it appears that the defendant had paid up his defaults, except the attorneys' fees in the sum of \$100.00. Several subsequent petitions for rules to show cause were filed by plaintiff, and orders were entered to show cause, based upon said petitions, and finally on June 26, 1945, the court in its order found that the parties had fully adjusted and settled all of their disputes, and the order set forth in detail the terms of their settlement. When defendant filed his petition on October 15, 1945, again asking for a modification of the decree, his financial condition and his circumstances were, in fact, no different from ^{that} which prevailed at the time of the entry of the orders of June 26, 1945, June 8, 1945, and May 18, 1945. He had made the claim of material change in his circum-

plaintiff's petition for the allowance of solicitors' fees, and providing that the reduction operate from the time as of October 18, 1945.

On February 13, 1946, plaintiff filed a petition asking an allowance for attorneys' fees and costs to prosecute this appeal totaling \$35.00. On the same day, the court denied the petition.

The court has power under section 18 of the divorce statute from time to time to modify a decree of divorce with respect to the provisions for the payment of alimony and support of a minor child, whenever a material change in circumstances is shown to justify the modification. The burden is upon the one who seeks the modification to show such change. This burden the defendant has not sustained. By his petition filed November 23, 1944, he admitted he was well able financially to support the child and asked that the child's custody be given to him. The court, on March 5, 1945, adjudicated that the defendant had ample means to pay the amount of his arrearages under the decree, and directed him to pay it instantly. By the order of May 18, 1945, it appears that the defendant had paid up his delinquent, except the attorneys' fees in the sum of \$100.00. Several subsequent petitions for relief to show cause were filed by plaintiff, and orders were entered to show cause, based upon said petitions, and finally on June 28, 1946, the court in its order found that the parties had fully adjusted and settled all of their disputes, and the order set forth in detail the terms of their settlement. When defendant filed his petition on October 15, 1945, again asking for a modification of the decree, his financial condition and his circumstances were, in fact, no different from which prevailed at the time of the entry of the orders of June 10, 1945, June 5, 1945, and May 18, 1945. He had made the claim of material change in his circum-

7.

stances on the previous hearings, and failed in his showing. In fact, the orders referred to, having been entered by agreement of the parties, together with the adjudication by the court that he was well able to pay, barred his right to a modification of the decree, since the conditions shown upon the last hearing were the same as they existed upon the entry of the previous orders, Pribyl v. Pribyl, 250 Ill. App. 349; Molt v. Molt, 320 Ill. App. 133.

Too frequently litigants in a divorce case have abused the privilege of asking a court to modify a decree of divorce with respect to the payment of alimony, claiming that right under the divorce statute. Too frequently do we find such procedure without merit, and it results in expense to and harassment of the opposite party. Whenever possible the courts should discourage this practice. As was aptly said by this court in Pribyl v. Pribyl, where a few months after an order had been entered fixing the amount of alimony to be paid, the defendant sought to have the amount modified:

"He cannot, a few months thereafter, obtain an order reducing the amount of alimony based upon a comparison of present conditions with conditions which obtained long prior to the last order fixing the amount of alimony."

Plaintiff complains the court erred in denying a reasonable allowance for expense of defending against the petition of defendant for modification of the decree, including solisitors' fees. In this there is merit. Thomas v. Thomas, 233 Ill. App. 488; Stillman v. Stillman, 99 Ill. 196. In Pike v. Pike, 123 Ill. App. 553, this court said:

"It would be unreasonable to require appellee to bear the burden of employing counsel to look after applications made to the court by appellant with reference to the child, such as are here shown, out of the allowance made to her by the decree."

stances on the previous hearing, and filed in his showing. In fact, the orders referred to, having been entered by agreement of the parties, together with the adjudication by the court that he was well able to pay, barred his right to a modification of the decree, since the conditions shown upon the last hearing were the same as they existed upon the entry of the previous orders, Priddy v. Priddy, 230 Ill. App. 349; Molt v. Molt, 230 Ill. App. 135.

Too frequently litigants in a divorce case have abused the privilege of asking a court to modify a decree of divorce with respect to the payment of alimony, claiming that what under the divorce statute. Too frequently do a fine such procedure without merit, and it results in expense to and harassment of the opposite party. Whenever possible the courts should discourage this practice. As was aptly said by this court in Priddy v. Priddy, where a few months after an order had been entered fixing the amount of alimony to be paid, the defendant sought to have the amount modified:

"He cannot, a few months thereafter, obtain an order reducing the amount of alimony based upon a comparison of present conditions with conditions which obtained long prior to the last order fixing the amount of alimony."

Plaintiff complains the court erred in denying a reasonable allowance for expense of defending against the petition of defendant for modification of the decree, including solicitors' fees. In this there is merit. Thomas v. Thomas, 233 Ill. App. 486; William v. William, 22 Ill. 198. In Pike v. Pike, 123 Ill. App. 505, this court said:

"It would be unreasonable to require appellee to bear the burden of employing counsel to look after negotiations with the court by appellant with reference to the child, such as are here shown, out of the allowance made to her by the decree."

8.

Plaintiff also complains that the chancellor erred in denying plaintiff an allowance for solicitors' fees and expense for prosecuting this appeal. This contention is without merit. Section 15, chapter 40, Illinois Revised Statutes, 1945, does not authorize such an allowance to a wife where she is defeated in the lower court and appeals from the decree of the court. In Balswic v. Balswic, 179 Ill. App. 118, it was said of section 15:

"That section of the statute provides that where a husband takes an appeal he can be compelled to pay for the wife's defense on appeal, but does not provide for any payment for the wife to prosecute an appeal taken by her."

To the same effect is Shaffer v. Shaffer, 219 Ill. App. 200. Our search has failed to disclose any case in this state holding to the contrary, and none is cited by plaintiff.

The order of November 19, 1945, is reversed with directions to the lower court to deny the petition of the defendant for a reduction of the amount fixed by the decree for the support of the minor child. The order of January 17, 1946, is reversed with directions to hear and determine the reasonable amount to be allowed to plaintiff for defending the petition by defendant for a modification of the decree. The order of February 13, 1946, is affirmed.

AFFIRMED IN PART; REVERSED IN PART
AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Niemeyer, J., concur.

Plaintiff also complains that the chancellor erred in

denying plaintiff an allowance for solicitor's fees and
expenses for prosecuting this appeal. This contention is with-
out merit. Section 15, chapter 40, Illinois Revised Statutes,
1945, does not authorize such an allowance to a wife where
she is defeated in the lower court and appeals from the
decree of the court. In Bellavia v. Bellavia, 173 Ill. App. 116,
it was said of section 15:

"That section of the statute provides that where
a husband takes an appeal he can be compelled to
pay for the wife's defense on appeal, but does
not provide for any payment for the wife to
prosecute an appeal taken by her."

To the same effect is Shaffer v. Shaffer, 212 Ill. App.
200. Our search has failed to disclose any case in this state
holding to the contrary, and none is cited by plaintiff.
The order of November 19, 1945, is reversed with direc-
tions to the lower court to deny the petition of the defendant
for a reduction of the amount fixed by the decree for the sup-
port of the minor child. The order of January 17, 1948, is
reversed with directions to hear and determine the respon-
sible amount to be allowed plaintiff for defending the petition
by defendant for a modification of the decree. The order of
February 12, 1948, is affirmed.

APPEAL IN PART; REVERSED IN PART
AND AFFIRMED WITH DIRECTIONS.

O'Connor, P. J., and Wisniewski, J., concur.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A.D. 1946

329 I.A. 511

Term No. 46M5

Agenda No. 7

JOSEPH BROSH,

Plaintiff-Appellee,

vs.

PAUL HARRISON,

Defendant-Appellant.

Appeal from the

Circuit Court of

St. Clair County,

Illinois

CULBERTSON, P.J.

This is an appeal from a judgment in favor of Appellee, JOSEPH BROSH (hereinafter called plaintiff), rendered by the Circuit Court of St. Clair County, Illinois, against the Appellant, PAUL HARRISON (hereinafter called defendant).

This litigation was originally instituted in the Justice-of-the-Peace Court, whereupon, on a trial before the Court without a jury, the plaintiff prevailed, and on an appeal to the Circuit Court, where the matter was again tried before the Court without the intervention of a jury, the plaintiff again prevailed, and after motion for a new trial was heard and overruled by the Court, judgment was entered in favor of plaintiff for the recovery of the possession of a Sunnen crankshaft grinder, upon condition that plaintiff pay to the defendant the sum of \$125.00, in accordance with Chapter 119, Section 22, of the 1945 ILLINOIS REVISED STATUTES.

An examination of the evidence in this case discloses that Joseph Brosh, the plaintiff herein, was operating a motor rebuilding shop, and that on September 15, 1944, accompanied by the

defendant herein, Paul Harrison, he made a trip to Eldridge, Illinois, and there purchased from a lady by the name of Fay Crabtree, the crankshaft grinder in question. The full purchase price for the crankshaft grinder was \$450.00. There is a conflict in the evidence as to who the purchase was made by, that is to say, as to whether or not the property was purchased to be the partnership property of the plaintiff and defendant herein, or whether or not it was to be the property of the plaintiff herein. There was introduced on the trial of this cause the Bill of Sale given by Fay Crabtree, under date of September 16, 1944, to the plaintiff herein, Joseph Brosh, and which said Bill of Sale described the crankshaft grinding outfit in controversy. The plaintiff herein contends that at the time he purchased the crankshaft grinder he had no place to put it and that he placed it in the care of the defendant herein for safekeeping at the defendant's home. A few days later the plaintiff drove to the defendant's home to see about the crankshaft grinder and discovered it was gone. He was informed by the defendant that defendant's brother was in the hospital and that defendant needed \$300.00, so he borrowed \$300.00 from Tony Vistine, and had given plaintiff's crankshaft grinder as security for the debt. The plaintiff herein demanded of the defendant that the crankshaft grinder be given to him and his demand availed him nothing. He then instituted the replevin suit in the Justice Court.

The defendant herein makes no denial of having disposed of the crankshaft grinder to Vistine, but seeks to justify his conduct in that regard by saying that he had a right to dispose of the property as it was partnership property, and that he and the plaintiff herein were, in fact, partners. The conclusion could be drawn from the evidence that there had been some talk of a partnership being formed between the plaintiff and the defendant

herein, but that conversation does not appear from the evidence to ever had ripened into a legal partnership relation between the parties hereto. The plaintiff herein contends that he borrowed \$125.00 from the defendant herein at the time he purchased the crankshaft grinder, and stoutly asserts in his testimony that he was not associated with anyone else in the way of a partnership.

In this state of the record the Court found the issues for the plaintiff, and against the defendant, as hereinbefore set forth, and it is now contended on this appeal that the action of the Trial Court in that regard should be set aside for the reasons: (First) That the judgment of the Court is contrary to the manifest weight of the evidence; and (Secondly) That the judgment is contrary to the law; and (Thirdly) That the plaintiff has failed to sustain the burden of proof cast upon him by the law.

It would appear to us from an examination of the record in this case that an issue of fact was presented to the Trial . . . Judge who heard this case and tried same, without a jury, and his finding is entitled to the same weight as is the verdict of a jury, and will not be disturbed by an Appellate Tribunal, unless it is manifestly against the weight of the evidence (MOORE vs. DAVID J. MOLLOY CO., 222 Ill. App. 295, 298; PEOPLE, ETC. vs. C. & E. I. RY. CO., 258 Ill. App. 535, 540; MacCRACKEN vs. FIRST NAT'L BK OF WHEATON, 204 Ill. App. 20, 21; HANKINS vs. COLLEY, 106 Ill. App. 522).

In giving consideration to the question of whether or not the finding of the Trial Court is contrary to the manifest weight of the evidence, a Reviewing Court must have regard for the better opportunity of the Trial Court to determine the facts by reason of its opportunity to see and hear the witnesses (MARBLE vs. MARBLE, 304 Ill. 229, 232; CITY OF QUINCY vs. KEMPER, 304 Ill. 303, 307).

We do not believe, and we so hold, that the judgment of the Court in this case is not against the manifest weight of the evidence, but the evidence, on the contrary, gives abundant support to the finding and judgment of the Trial Court in favor of the plaintiff. The judgment of the Trial Court is in no wise contrary to the law, and we find, and so hold, that the plaintiff has fully and adequately sustained the burden of proof required of him to prevail in this case.

There being no error in this case, and the judgment being right under the law and the evidence, the same is hereby affirmed.

Abstract

Judgment affirmed.

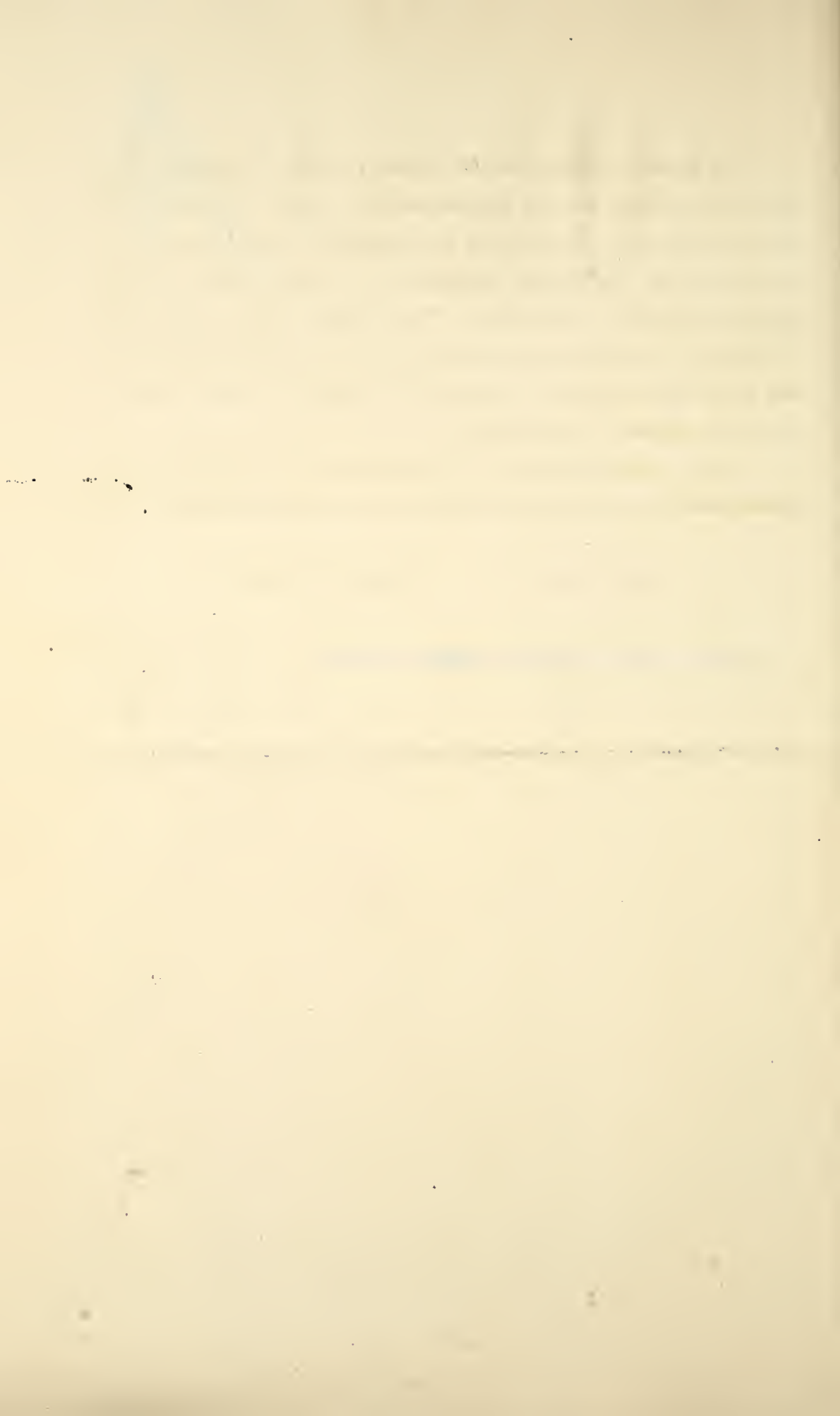
JUSTICE STONE AND JUSTICE BARTLEY CONCUR

FILED

OCT 4 1946

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MAY TERM, A.D. 1946

329 I.A. 511²

Term No. 46M14

Agenda No. 14

MINNIE SCHNEFF,

Plaintiff-Appellant,

vs.

HENRY MIRRING,

Defendant-Appellee.

Appeal from the

Circuit Court of

St. Clair County

BARTLEY, J.

The plaintiff, Minnie Schneff, brought suit in the Circuit Court of St. Clair County to recover damages from the defendant, Henry Mirring, for alleged injuries sustained by her on February 27, 1945, when, it is alleged, she was struck by defendant's automobile by reason of his negligence. After the original commencement of the suit, by leave of court the plaintiff added East St. Louis City Lines, Inc., as a party defendant and filed an amended complaint. The plaintiff dismissed the case afterwards as to the East St. Louis City Lines, Inc., and also dismissed the amended complaint. The case was submitted to the jury against the defendant, Henry Mirring, only upon the original complaint. The jury returned averdict finding the defendant, Henry Mirring, not guilty, and after denying the plaintiff's motion for a new trial, the court entered judgment on the verdict and in bar of the action and adjudged costs against the plaintiff.

The plaintiff, Minnie Schneff, was a passenger on a State Street bus, going west, in the City of East St. Louis, on the

morning of February 27, 1945, shortly after midnight. She was enroute home after having been bowling at Edgemont, which is some 30 blocks east of the place of the occurrence in question; when arriving at the intersection of Fifty-ninth and State Streets, the plaintiff signaled the bus to stop and she alighted on the northwest corner. She was walking south across State Street on her way home when she was struck or walked into the automobile of the defendant, which was being driven east on State Street. State Street runs east and west and Fifty-ninth Street runs north and South. State Street is about 60 feet wide. It has two traffic lanes on each side or four in all -- two going each way. The intersection is equipped with four electric stop and go signs, which were in operation at the time of the occurrence in question. It was snowing and a small amount of snow was on the ground.

The only evidence as to what happened at the time of the occurrence in question consists of that of the plaintiff, Minnie Schneff, and the defendant, Henry Mirring.

The plaintiff testified that when she got out of the bus, she stepped onto the sidewalk; that the light on the traffic signal was green for State Street and that the bus went on. She testified further that she then waited for the signal lights to turn green for southbound traffic; that when she walked across the street, she watched for traffic and also watched the signals; and that as she walked across the street, the signals were green for southbound traffic and red for the east and westbound traffic. She testified further that she did not know how far she had gotten across the street; that it must have been more than half way, and that she did not know whether something hit her or whether she ran into it; that the next thing she knew, she was lying in the street and that a passing physician came by and picked her up;

that this physician took her to a hospital where she remained for five days; that both her hands were bruised and swollen and she had a big lump on her head, and that blood vessels in her hands were broken. On cross-examination, she testified that she was familiar with the intersection in question; that there was not anything to have prevented her from seeing the automobile coming; that after she left the sidewalk to walk across the street, she could see an automobile if anything was there; that she had no warning of an automobile; that she could not see whether an automobile was there; and that she did not know whether she hit the machine or it hit her; that she was worrying about getting across the street and was watching the lights in going home; and that she remembers two police officers coming to the hospital and talking to them.

The defendant, Henry Mirring, testified that the left rear fender of his car came in contact with the plaintiff, Minnie Schneff, and after the accident, he went to the hospital with the plaintiff in the physician's car; that while he was there, the police officers came and talked to the plaintiff; that at the time of the accident, there were no cars on the street; that the headlights on his automobile were burning; that he was driving east in the right lane nearest the sidewalk, three or four feet from the curb; that he looked at the stop lights before he entered the intersection and that they were in his favor -- green; that out of the side of his eye, he saw a woman walking across the street and that she only walked until she came in contact with his car.

A police officer testified that he learned of the accident at the corner of Fifty-ninth and State Streets and he went to the hospital, where the plaintiff had been taken and saw her; that

the defendant and the physician, who had taken the plaintiff to the hospital were there, and that he asked both parties how the accident happened and that the plaintiff said she walked into the rear end of the defendant's car, and that she did not want the man arrested.

The plaintiff contends that the verdict of the jury is contrary to the manifest weight of the evidence.

From the statement of facts and evidence in this cause, heretofore set out, it is patent that the issues of fact as to the exercise of due care and caution by the plaintiff, negligence on the part of the defendant, and proximate cause were for the jury. These questions of fact have been decided by the jury, under the instructions of the court as to the law, adversely to the plaintiff. It is plain that the verdict of the jury is not contrary to the manifest weight of the evidence.

The plaintiff has also assigned errors on account of the giving of defendant's instructions numbered 4 and 5, because it is said that such instructions are argumentative. Instruction number 4 told the jury that if they believed from the evidence the plaintiff was guilty of any negligence which contributed to her injuries, she could not recover. This instruction had included in it a statement to the effect that it was unimportant how far such negligence contributed to her injuries, because if said negligence contributed to her injuries at all, then she could not recover. Defendant's instruction number 5 told the jury, in substance, that they should not consider the question of damages until they first decided that the defendant was liable, and there was included in the instruction a statement to the effect that if the defendant is not liable, then the plaintiff would not be entitled to recover. Obviously, the instructions are argumentative. As to whether there is reversible error in an instruction,

which is argumentative in any given case, must depend upon all the circumstances and conditions present. The arguments here complained about are so elementary and so self-evident that they need not have been stated. The Lake Erie & Western Railroad Company v. Harmon Helmerick, 29 Ill. App. 270. An instruction, because of argumentativeness, will not constitute reversible error, if it has not prejudiced the opposite party. From this record we are satisfied that the instructions complained about in no way prejudiced the cause of the plaintiff.

The jury was entirely warranted in the verdict reached and we find no reversible error in the record. The judgment of the Circuit Court of St. Clair County is affirmed.

Abstract

AFFIRMED.

PRESIDING JUSTICE CULBERTSON AND JUSTICE STONE CONCUR

FILED

OCT 4 1946

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A.D. 1946

329 I.A. 512

Term No. 46M20

Agenda No. 11

RAYMOND MENG, LAVINA MENG
and CONRAD MENG,

Plaintiffs-Appellants,

vs.

VERDELL V. LUCASH,

Defendant-Appellee.

Appeal from the
Circuit Court of
St. Clair County

BARTLEY, J.

Plaintiffs-Appellants, Raymond Meng, Lavina Meng and Conrad Meng, hereinafter referred to as plaintiffs, filed suit against Verdell V. Lucash, defendant-Appellee, hereinafter referred to as defendant, to recover judgment against him for personal injuries sustained by Raymond Meng and Lavina Meng and for damages sustained to the truck of Conrad Meng, as the result of a collision in the Village of Freeburg on August 3, 1944, between the truck of plaintiff, Conrad Meng, driven by plaintiff, Raymond Meng, and a parked truck belonging to the defendant. Raymond Meng was accompanied by his wife, Lavina Meng, at the time of the collision. There was no one in the defendant's truck at the time. The case was tried by a jury which returned verdicts in favor of the defendant against each plaintiff. Plaintiffs' motion to set aside the judgment and verdict of the jury and for a new trial was denied and judgments in bar of action and for costs were entered against the plaintiffs in the trial court.

This is an appeal by plaintiffs from those judgments.



Count I of the complaint charged that the defendant had negligently parked his motor truck upon Route 13 in the Village of Freeburg, facing to the north, between White and High Streets, in violation of paragraph 202, Sec. 105, Chap. 95 $\frac{1}{2}$, Ill. Rev. Stat., 1943; that defendant parked his truck and permitted it to stand there for a long period of time between 7:00 o'clock P.M. until 9:00 o'clock P.M., without displaying a light at the front and at the rear of said motor vehicle; that plaintiff, Raymond Meng, in the exercise of due care and caution for his own safety and for the safety of the truck belonging to plaintiff, Conrad Meng, and without any knowledge or warning that defendant's truck was parked on the hard road without any lights, drove said truck, striking the rear end of defendant's truck; that plaintiff, Raymond Meng, suffered serious injuries; he asked damages in the sum of \$5,000.00.

Counts II and III of the complaint were re-allegations of Count I, except that Count II was applicable to the plaintiff, Lavina Meng, who was riding with her husband in the truck, and Count III was for damages for repairs and loss of use of the truck and was applicable to the plaintiff, Conrad Meng, Lavina Meng asked damages in the sum of \$5,000.00, and Conrad Meng asked damages in the sum of \$1,000.00.

Defendant, in his answer, denied the material allegations of the complaint, and said that he parked his truck upon the parking space along the east side of Route 13.

There are many errors assigned by plaintiffs, but those argued by plaintiffs in this court are that the trial court erred in denying their motion for new trial on the ground that the verdict was contrary to the manifest weight of the evidence, and that the trial court erred in giving certain instructions on behalf of the defendant.

The occurrence in question happened on Illinois Highway Route 13, about 60 feet north of the intersection of Route 13 and High Street on the east side of Route 13. Route 13 runs north and south and is 33 feet wide at this point from curb to curb. High Street runs in an easterly and westerly direction. The Freeburg Lumber Company has an office and sales building located on the northeast corner of this intersection. This building faces to the west and is on the east side of Route 13. The front of the building on Route 13 is 48 feet wide; there is a 12 foot driveway leading into the lumber yard, the south edge of which is 18 feet north of the lumber yard building.

On August 3, 1944, at about 8:15 or 8:20 in the evening, Daylight Saving Time, defendant parked his truck on the right or east side of Route 13 at or near the driveway north of the lumber yard building. The truck was a Ford truck with a logging bed, specially built to load timber; the bed was about four feet from the pavement and was flat with a pipe on the back. The truck was of a dual wheel type. Some of the truck was covered with mud. The over-all length of the truck was $18\frac{1}{2}$ feet and it was 7 feet 3 inches wide at the widest point; the frame work was made of channel iron and I-beams, and the truck weighed in the neighborhood of 8,000 or 9,000 pounds.

Plaintiff, Raymond Meng, testified that he and his wife, Lavina Meng, left their home that evening between 8:45 and 9:00 P.M. in a small truck; that he did not look at a clock before leaving; that they had a light in the house at the time; that they drove east four blocks on Washington Street to the hard road and got onto Route 13, one block south of the scene of the accident; that they turned north on Route 13; that he drove about 20 to 25 miles per hour and that he was going to stop at his aunt's, who lived in the block north of the intersection of Route 13 and High

Street; that he was driving with his bright lights on and when he reached the intersection of Route 13 with High Street, he noticed a truck coming south on the west side of Route 13 about the middle of the block north of High Street; that he dimmed his lights and that the driver of the truck coming south, also dimmed his lights. He stated that as he passed the lumber yard, he noticed the building was all lighted up; that he was going to make a stop between the first and second gate north of the lumber yard on the east side of the street; that when he made the turn to go to the curb, he was angling in and that before he stopped, he saw a truck but did not have time enough to put on the brakes; that the truck he was driving collided with another truck, which he later learned was the defendant's; that he was driving about 18 miles per hour after he slowed down to park; that he did not know how fast he was going at the time of the collision. Plaintiff stated that he did not see the defendant's truck when he dimmed his lights and he did not see it until he was on it; that with his dim lights on, he could see 20 to 25 feet ahead and with his bright lights, he could see 50 to 75 feet ahead; he stated that he started to turn over to the curb when he got to the middle of the lumber yard; that he was traveling on the east side of the black line and was keeping a lookout for parked cars as he drove toward the curb; that he knew that it was customary for people to park on the side; that they parked there at both times, at day and night, without lights; that when he first saw the defendant's truck, he had gotten over to the curb as far as he could go and was facing straight north and was about 10 feet away from it; that it was such a short distance, he could not stop his truck. He was in the hospital ten days and was out of work for two months after the accident.

Plaintiff was corroborated by his wife, Lavina Meng, and seven witnesses, who, in whole or in part, corroborated plaintiff in that it was dark at the time the accident happened, and that they could not see the trucks from where they were standing because of darkness, and that lights were on in the neighborhood and also about the time the accident happened.

Defendant, Verdell Lucash, testified that he was in the logging and lumber business in St. Clair County; that on the date in question, he drove his truck to the Freeburg Lumber Company; that he stopped his truck on the right hand side of Route 13 about 60 feet north of the intersection with the truck facing north; that it was about 8:15 or 8:20 o'clock in the evening, Daylight Saving Time; that it was daylight; that there was a light burning in the lumber yard building and that there was no tail-light on the truck and that the head-lights were not on; that he went into the lumber company office and was in there about ten or fifteen minutes when he heard a crash and when he went outside to see what happened, he saw a truck "rammed" into his truck; that his truck was not standing in the same place where he had parked it; that it was moved 10 or 15 feet farther north.

Defendant had 5 witnesses testify for him who corroborated him, in whole or in part, in regard to it being light at the time of the accident and that the trucks were visible from where the witnesses were standing at the time because of daylight, and in regard to the time the accident happened. One of the defendant's witnesses, Alfred Zipple, stated that he was 35 feet from where the accident happened; that he saw Meng's truck run into the back end of defendant's truck; that it was daylight at the time; that he recognized both the defendant's truck and Meng's truck by the names on them, which were visible, and that the street lights were off at the time of the accident.

The foregoing shows the conflict in the testimony of the witnesses in regard to the circumstances prevailing at the time of the occurrence in question and particularly as to whether it was light or dark at the time; all tending to bear on the question of whether or not the defendant was negligent in not having a tail light on his truck when he parked it at the time he did; and whether or not plaintiffs were in the exercise of due care and caution for their safety and whether or not the negligence of the defendant, if he were negligent, was the proximate cause of the collision, or whether the proximate cause of the collision was a failure on the part of plaintiffs to look for and see the defendant's parked truck in time to avoid colliding with it.

The question of negligence on the part of the defendant, due care on the part of the plaintiffs, and proximate cause of the collision were issues of fact to be determined by the jury under proper instructions of the court. *Hutson v. Flatt*, 194 Ill. App. 29; *Philpott, et al v. Parham*, 316 Ill. App. 278; *Summers, et al v. Hendricks*, 300 Ill. App. 498.

The trial judge had the opportunity of seeing and hearing the witnesses testify and this court, in passing on the question of whether the verdict and judgment was against the manifest weight of the evidence, must take into consideration not only the verdict of the jury but the fact that the trial judge, who overruled the motion for a new trial and entered judgment, saw and heard the witnesses. *Heil v. Kastengren*, 328 Ill. App. 301, 307; *Wheeler v. Rudek*, 328 Ill. App. 283, 295; *Read v. Friel*, 327 Ill. App. 532.

This Court will not usurp the functions of a jury and set aside a verdict unless it is clearly and palpably contrary to the manifest weight of the evidence. *Trust Co. of Chicago v. Ancateau* 317 Ill. App. 186, 191. *Howard v. Baltimore & O. C. Terminal R.*

Co., 327 Ill. App. 83, 100.

We do not feel that the record here indicates that the verdict of the jury was contrary to the manifest weight of the evidence.

Plaintiffs complain of Instruction No. 5 given on behalf of the defendant which told the jury that the fact that the court had given it instructions on the subject of the damages or injuries sustained by the plaintiffs, or that counsel had discussed such subjects during the trial, was not to be taken as an intimation by the court, or an admission by the defendant, of any liability upon the part of the defendant to the plaintiffs. Plaintiffs insist that the instruction is prejudicial and is so confusing, misleading and argumental as to constitute reversible error. The instruction is of a cautionary nature and instructions of a similiar nature have been held not to constitute error. *Jenisek v. Riggs*, 320 Ill. App. 158; *Denton v. Midwest Dairy Products Corp.*, 284 Ill. App. 279, 285.

Plaintiffs complain of Instructions 9, 10 and 11 given on behalf of the defendant. Each instruction applied to one of the plaintiffs and told the jury that before the plaintiff, to whom the instruction was applicable, could recover, he must prove by the greater weight or preponderance of the evidence in the case: (1) that the defendant was guilty of negligence as charged in the complaint; (2) that such negligence constituted the direct and proximate cause of the collision; and (3) that said plaintiff was guilty of no negligence or failure to exercise due care for his own safety which proximately caused, or proximately contributed to, the collision, and further told the jury that if said plaintiff had not so proved each and all of these propositions, the defendant was not liable to him and it would be the jury's duty

to find the defendant not guilty as to the count in the complaint applicable to the respective plaintiff. The plaintiffs contend that the Instructions constitute reversible error for the reason that taken with defendant's other Instructions, they unnecessarily repeat and reiterate matters which are covered in other Instructions. Since each of the Instructions pertains to one of the plaintiffs, each of whom stated their respective separate causes of action in separate counts in the complaint, we do not believe that the giving of these Instructions constituted an unnecessary repetition which gave any undue prominence to any particular matter. The expression, "he must prove", or "she must prove", included in these Instructions and complained of by plaintiffs, has been approved. *Stivers v. Black & Co.*, 315 Ill. App. 38; *Stollery v. Sprague*, 301 Ill. App. 209.

Another of defendant's Instructions complained of, is Instruction 12, which told the jury that the mere fact that a collision occurred between the two trucks and that the plaintiffs sustained injuries or damages as the result of that collision, did not, in themselves and without more, constitute evidence of negligence upon the part of the defendant, or of due care upon the part of the plaintiffs. Instructions of a similar nature have been held both proper and improper, depending on the record in the particular case. Instructions of this type have a strong tendency to mislead the jury. If they do mislead the jury, they should be condemned and held erroneous. We have considered this Instruction in connection with the other Instructions given by the court and in connection with the evidence in the case, and do not believe in this case that it tended to mislead the jury, and find that the Instruction was not prejudicial in this case. *Stivers v. Black & Co.*, 315 Ill. App. 38; *Martini v. Donk Bros.*

Coal & Coke Co., 169 Ill. App. 139; Gibbons v. Chapin & Gore, et al, 147 Ill. App. 575.

Plaintiffs contend defendant's Instruction No. 19 is erroneous. This Instruction pertains to the measure of damages allowable to the plaintiffs, Raymond Meng and Lavina Meng, for personal injuries, if the jury found the issues in their favor. In view of the verdict and judgment for defendant, it is not necessary for this court to pass upon the question of whether or not said instruction was erroneous, for the reason that it could not prejudice plaintiffs since the jury did not have occasion to consider the question of damages. Gould v. Magnolia Metal Co. 207 Ill. 172; Kugel v. City of Sterling, 164 Ill. App. 371; King v. Ill. Midland Coal Co., 158 Ill. App. 351.

We find that the verdict was not contrary to the manifest weight of the evidence. We have examined all of the instructions given on behalf of the defendant, and find no prejudicial or reversible error in them. We find no reversible error in the record.

The Judgment of the Circuit Court of St. Clair County is hereby affirmed.

Abstract

AFFIRMED.

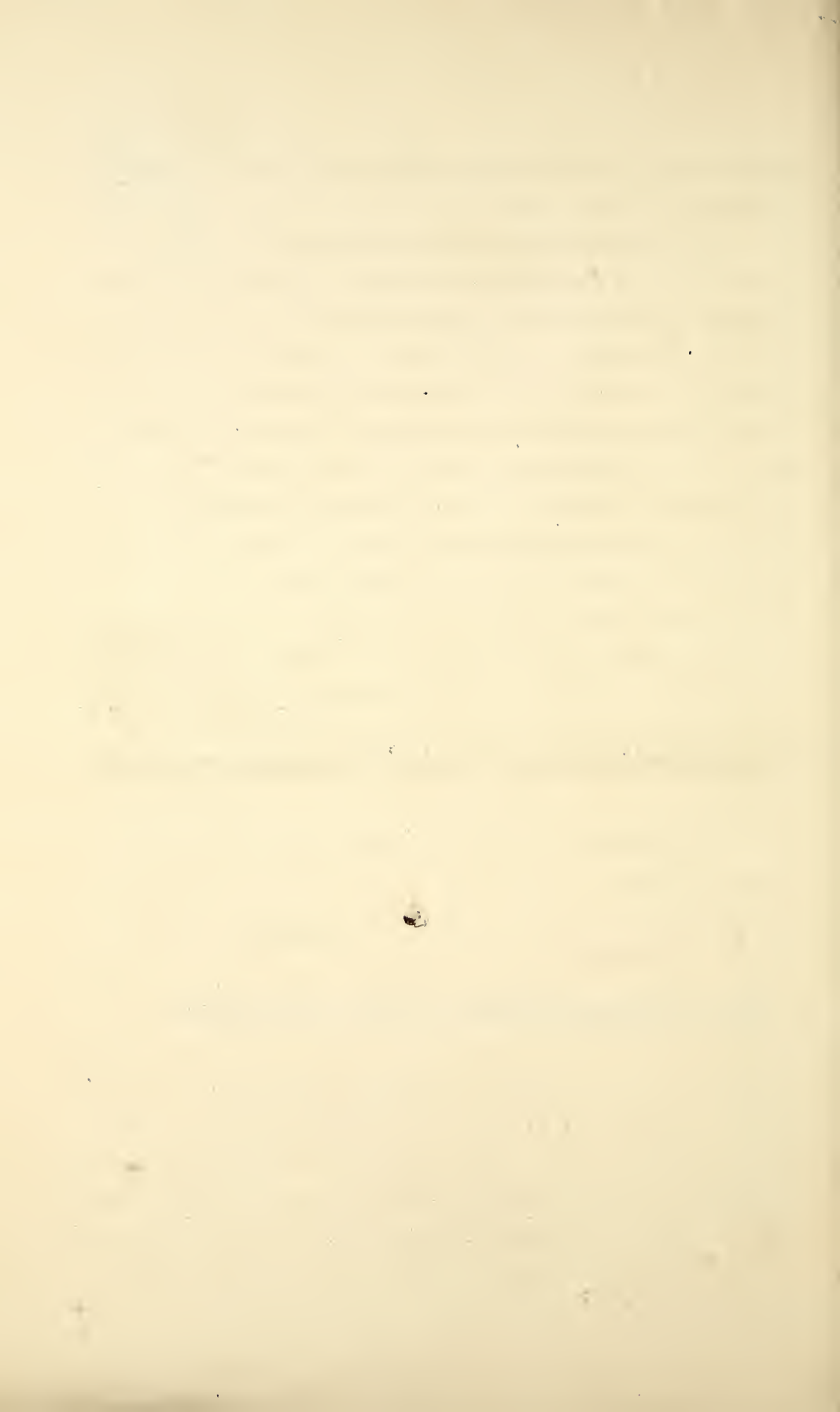
PRESIDING JUSTICE CULBERTSON AND JUSTICE STONE CONCUR

FILED

OCT 4 1946

Stanley R. Brown

**CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS**



4

Agenda No. 13

329 I.A. 512
from the
Circuit Court of

Stone, J.

This is an action brought by Charles H. Theis, Plaintiff-Appellant, (hereinafter designated as Plaintiff) against Ernest Itterman, Defendant-Appellee (hereinafter designated as defendant) to recover a real estate broker's commission of five per cent, based upon the alleged sale by plaintiff of certain real estate belonging to defendant.

Defendant and his brother-in-law, Edward Berendt, with their wives, were the joint owners of a two family apartment, situated in Granite City, Illinois. The undivided one-half interest owned by defendant, was sold by him to the brother-in-law, the said Edward Berendt, on August 11, 1944. Plaintiff, a real estate broker, claims that on or about July 1, 1944, defendant entered into an oral agreement by which defendant agreed to give plaintiff, the agency for the sale of the undivided one-half interest in this property. He further claims that he was the inducing cause of the sale of the property, and that defendant owes him a commission of \$325.00. The action is maintained on the theory of an implied contract, between the parties.



On a trial of the case before a jury, verdict was rendered in favor of defendant. Motion for new trial was overruled by the trial court, and plaintiff prosecutes his appeal to this court.

It is argued on behalf of plaintiff that the verdict and judgment are against the manifest weight of the evidence, and that the verdict of the jury should have been set aside and a new trial awarded, because the verdict of the jury was palpably against the weight of the evidence.

The plaintiff testified that he was in the real estate business, and had an office with one Alexander Rouland; that the said Rouland was also a real estate broker, and was endeavoring to sell the home of Joseph G. Boggs, in Granite City, and that Rouland has asked him to help him make a sale of that property; that he first talked to defendant about the sale of the half interest in his house on July 27, 1944, at the home of defendant; that plaintiff asked him if he were not ready to dispose of his interest in the house where he was living, and that defendant replied that he was interested but could not get his brother-in-law to agree to buy or sell. Plaintiff testified that he later made an appointment with him to look at the Boggs house, which was done on July 27th, when plaintiff and Rouland took defendant and his wife to look at the house.

Plaintiff further testified to the effect that the same evening he talked with defendant at defendant's home, and that defendant then said that he would give Boggs \$10,000.00 for his home, if plaintiff could get him \$7,500.00 for his interest in the two family apartment, and that the understanding was, that plaintiff was to see Berendt, the brother-in-law, and joint owners, and talked to him about the deal; that he did talk to Berendt about the matter and Berendt told him that \$7,500.00 was too much for the property, and that it was worth about \$6,500.00,



that plaintiff asked Berendt, if that would be an offer and was told that they wanted to ascertain for certain that the property, or defendant's share could be sold without the consent of Berendt, that plaintiff was to see Berendt later, and that when he went back at the end of two weeks, he found that the deal had been closed, and Berendt had bought the half interest of defendant for \$6500.00; that when he approached defendant about his commission of five per cent of that amount, defendant claimed that he did not owe him any thing, so suit was instituted.

Defendant Ifterman testified, and is corroborated to some extent by his wife, that all unsolicited by him plaintiff came to his home and told him that he understood that defendant wanted to buy another house or wanted to trade, and offered to show him the property to buy; that later Rouland and plaintiff took defendant and his wife to see the Boggs property. Mrs. Ifterman testified that upon arriving at the Boggs place, she told them that she had already seen this property, which conversation was denied by plaintiff and by Rouland. Defendant further testified, that after they returned to his home there was no more talk about the property, and that plaintiff did not come back and that defendant did not see him again until he met plaintiff on the street and he asked defendant for his commission. The record shows that defendant subsequently purchased the Boggs property.

To be entitled to a commission under the ordinary brokerage contract the broker must be the efficient or procuring cause of the sale. Roefner vs. Frey 209 Ill. App. 207; Woolf vs. Hamberger 201 Ill. App. 303; O'Brien vs. Newhouse, 196 Ill. App. 39. A broker's contract is governed by the law applicable to ordinary contracts. There must be a meeting of the minds of the parties through offer and acceptance and the contract must

be definite and certain in its terms. Halladay vs. Underwood, 90 Ill. App. 130.

The question whether plaintiff established a contract of employment by defendant was a question of fact for the jury to determine. Purgett vs. Weinrank, 219 Ill. App. 28; Tupy vs. Cech, 199 Ill. App. 496. And the question as to whether or not plaintiff, as a real estate broker, was the procuring cause in bringing about a transfer of the property was a question of fact for the jury. Grapperhaus vs. Taylor, 195 Ill. App. 165; O'Brien vs. Newhouse, supra; Ogren vs. Sundell, 220 Ill. App. 584.

The jury decided these questions, which were the crux of the law suit, in favor of defendant. Where the evidence is conflicting, as in the instant case, it is for the jury to weigh the same and determine where the preponderance is, and their findings will not be disturbed unless it is manifestly against the weight of the evidence. Voellinger vs. Kohl, 261 Ill. App. 271; Howitt vs. Estelle, 92 Ill. 218. We are not inclined to so hold. It might well be that in determining the issues involved in this case, the jury took into consideration the relationship between the seller and the purchaser, the fact that they were living in the same house, and that each held an undivided one-half interest in the property in controversy, in determining whether plaintiff was the procuring cause of the sale. Also it is a legitimate inference which they might justly draw from the evidence that the primary consideration herein involved between the parties, was the sale of the Boggs property and not the sale of the two family apartment. We are of the opinion that the trial court did not err in refusing to set aside the verdict and to award a new trial.

Complaint is made that the court erred in the exclusion

of alleged competent evidence offered by plaintiff, Edward Berendt, when called as a witness by plaintiff, was asked whether he told plaintiff, that he first wanted to find out whether Itterman, his brother-in-law, had the right to sell without his permission. Regardless of any question of competency or materiality, we are constrained to hold that the exclusion of this testimony did not constitute reversible error.

Complaint is made that the trial court erred in refusing to give a certain instruction, which is not numbered either in the record or abstract. The instruction is long, and we do not quote it verbatim in this opinion. Suffice it to say, that the instruction contained such phrases as "if you believe*****that defendant*****was anxious to sell" - "That said Berendt was interested in the purchase"; "If you believe****that Berendt, after satisfying himself." The use of such words as "anxious", "Interested" and "satisfying", descriptive of a state of mind, and capable of many nicities of shading in their meaning, could only be confusing and misleading. An instruction calculated to be misleading is properly refused. *Albrecht & Co. vs. Massing, et al.* 199 Ill. App. 182.

Finding no reversible error, the judgment of the Circuit Court of Madison County will be affirmed.

AFFIRMED

PRESIDING JUSTICE CULBERTSON AND JUSTICE BARTLEY CONCUR

Abstract

FILED
OCT 4 1946
Stanley R. Brown
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A.D. 1946

329 I.A. 513

Term No. 46M13

Agenda No. 12

EUGENE C. FELT, ET AL,

Plaintiff

vs.

CLINT CROSBY, ET AL,

Defendants

JARECKI MANUFACTURING COMPANY,
a Corporation

Plaintiff in Counterclaim-Appellant,

vs.

CLINT CROSBY, HARRY G. AMES, FRANCES
E. ROSS, et al,

Defendants in Counterclaim-Appellees.

Appeal from the
Circuit Court of
White County

STONE, J.

This action was commenced as a suit for foreclosure of an oil and gas lien by Eugene C. Felt, et al, doing business as Universal Butane Company, against Clint Crosby, Frances E. Ross, Harry G. Ames, Jarecki Manufacturing Company, and others. Jarecki Manufacturing Company, Appellant (hereinafter designated as Plaintiff in Counterclaim,) filed an answer and counterclaim against Clint Crosby, Harry G. Ames, Frances E. Ross, et al, Appellees (hereinafter designated as Defendants in Counterclaim) in which it claims to have been a judgment creditor of Clint Crosby as of September 15, 1943, at which time it is alleged said Crosby owned the oil and gas leasehold estate on certain lands in White County, Illinois. The issues for the consideration of the trial court were those drawn between Jarecki Manufacturing

1.

FILED

OCT 4 1946

Stanley R. Brown

CLERK OF THE APPELLATE COURT,
FOURTH DISTRICT OF ILLINOIS

Company as Counterclaimant and Frances E. Ross, Harry G. Ames, assignees of Frances E. Ross and Assignees of Harry G. Ames, Defendants to Counterclaim.

On May 8, 1943, Clint Crosby, being then the holder of a certain farm-out contract involving the lease in question and executed by Tidewater Associated Oil Company, entered into a written contract with C. R. Ross, who it is claimed was acting as agent for his wife, defendant in Counterclaim, Frances E. Ross, whereby Ross agreed to purchase, for the consideration therein expressed, seven-eighths of the interest to be acquired by Crosby from Tidewater. On the same day Ross contracted with Ames to sell a portion of the interest purchased by Ross from Crosby. Also on the same day Crosby and Ross entered into an escrow agreement with the City National Bank of Centralia, depositing \$6250.00 of the consideration to be paid to Crosby for seven-eighths of the working interest.

The total consideration to be paid Crosby was \$3.25 per foot for the depth that Crosby, who was a rotary drilling contractor, should drill the first well, plus certain coring and day work, plus \$2500.00. A part of this was paid through the moneys deposited in escrow in the bank, and partly by checks signed by C. R. Ross, but which checks were drawn on and charged against the account of Frances E. Ross, on which C. R. Ross was authorized to draw checks.

It is alleged that on or about June 16, 1943, Frances E. Ross, by and through her agent, C. R. Ross and his employees went into possession of this property, took charge of the well, and proceeded to clean out, drill in and complete and equip the same. Crosby used a rotary rig, as a drilling contractor, to drill the number 2 well, and when it was drilled to the sand, Frances E. Ross took charge of it, and Crosby apparently left.

The first oil was run from the lease on September 11th, 1943, and the run ticket was in the name of C. R. Ross. On September 15, 1943, the Jarecki Manufacturing Company secured its judgment against Clint Crosby in the sum of \$6025.57 in the Circuit Court of White County; execution was issued on that date and returned by the Sheriff "not satisfied" Crosby got an assignment from the Tidewater Company on August 10, 1943, and this was recorded as of November 26, 1943, and immediately after on the same day the assignment from Crosby to Ross and others, of the seven-eighths interest, was recorded.

The decree found that Clint Crosby was the owner of the farm-out agreement and had equitable title to the oil and gas lease on June 14, 1943; that Frances E. Ross was in possession of the property in controversy at the time of the entry of the Jarecki judgment, which judgment was subject to the rights of Harry G. Ames and Frances E. Ross, and the counterclaim was dismissed as to all defendants except Clint Crosby and Marie Crosby.

It is urged as error that the trial court erred in dismissing the counterclaim, and in not declaring the Jarecki judgment to be a valid lien against all of the interest in the said lease. It is argued on behalf of plaintiff in the counterclaim that the acts and representations of Frances E. Ross, Harry G. Ames and his assigns, was not of such possessory nature, as to put plaintiff in counterclaim on notice, and that the evidence shows that the Jarecki judgment and the lien created thereby was prior to the assignment to Frances E. Ross, and therefore any interest taken in said leasehold estate by virtue of the assignment from Clint Crosby, judgment debtor of the Jarecki Manufacturing Company, to Frances E. Ross, was taken subject to the lien of the judgment.

With reference to the former proposition, much stress is laid upon the fact that one Archie Hoosier, who was an agricultural tenant, living about three hundred feet from the first well drilled, and who had a claim for damages due him, testified in behalf of plaintiff in counterclaim that he thought Crosby owned the lease, until several months after the first oil was run. All the witness Hoosier was seeking, was surface damages, which would be naturally paid by the drilling contractor.

For defendant in the counterclaim, C. R. Ross testified that he was acting as agent for his wife, Frances R. Ross, that the No. 1 well was completed in June or July, that it was drilled to the sand before the funds were withdrawn from escrow; that after that he took over operation, set pipe on it, cemented and drilled it in, and had been in charge of it ever since, and was present on the premises practically all of the time. C. O. Ross, cousin of C. R. Ross, testified that he was a cable tool driller, and worked on the premises, on the number 1 well, going to work on it, right after it was drilled in May 1943, and was working for C. R. Ross, Harry Ames testified that he was out at the property on several occasions during drilling operations, and that C. R. Ross moved his cable rig in; began cleaning out the well and put it in production. Possession of property is equivalent to recording of deed and is notice of all rights of party in possession. Chicago Title and Trust Co. vs. Darley, 363 Ill. 197; Carnes v. Whitfield, 352 Ill. 384; German American Bank v. Martin, 277 Ill. 629. Pasquay v. Pasquay, 235 Ill. 48 Farmer's National Bank v. Sperling, 113 Ill. 273; Tillitson v. Mitchell, 111 Ill. 518; Hatch v. Bigelow 39 Ill. 546; Manly v. Pettee, 38 Ill. 129; Doll v. Walter, 305 Ill. App. 188.

In order to be notice of possession, it is only necessary that the acts be such as to put a person on inquiry, and not that



they be such as to establish title by adverse possession. Whatever is sufficient to put a party upon inquiry is notice of all facts which pursuit of such inquiry would lead to. *Carnes v. Whitfield*, supra; *German American Bank vs. Martin*, supra, *Hatch vs. Bigelow*, supra.

Counsel for plaintiff in counterclaim admit, in their argument that one of the questions involved is whether defendants in counterclaim went into sufficient possession of said premises as to place on notice a judgment creditor of Clint Crosby, and whether that possession was prior to September 15, 1943, the date of the Jarecki judgment. On these controverted questions of fact the Chancellor held affirmatively. His decision upon these questions of fact will not be disturbed unless palpably against the weight of the evidence. *Scroczyński vs. Schultz*, 381 Ill. 86, *Lewis v. McCreedy, et al*, 378 Ill. 264; *Cravens et al v. Hubbel et al*, 375 Ill. 51; *Van Amburg, et al v. Reynolds* 372 Ill. 317; *In re; Herrin's Estate*, 314 Ill. App. 1.

In the state of the record in this case, we are not inclined to hold that these findings are against the weight of the evidence.

With reference to the latter proposition, it would seem that in equity Crosby never was the owner of seven-eighths of this interest, because by the time he obtained his assignment, he held seven-eighths of the interest covered thereby in trust for Frances E. Ross and Harry G. Ames, according to the terms of their contracts, and the only interest to which the lien of the judgment against Crosby could attach was the one-eighth of the working interest which he did not sell.

We find no reversible error in the record, and the decree of the Circuit Court of White County will be affirmed.

AFFIRMED.

Abstract

THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY
CHICAGO, ILLINOIS 60637
U.S.A.
1964

TO THE HONORABLE CHAIRMAN OF THE BOARD OF TRUSTEES
OF THE UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637
U.S.A.

SIR,

I have the honor to acknowledge the receipt of your letter of the 11th inst. and in reply to inform you that the same has been forwarded to the appropriate authorities for their consideration.

I am, Sir, very respectfully,
Yours truly,
[Signature]

DEPARTMENT OF CHEMISTRY
UNIVERSITY OF CHICAGO
CHICAGO, ILLINOIS 60637
U.S.A.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
MAY TERM, A.D. 1946

329 I.A. 513²

Term No. 46M16

Agenda No. 6

HENRY McDOWELL, DOSHIA BOYER,
EURA SWITZER, NANNIE BRADLEY,
ALICE WINTERS, GEORGE DUVALL,
MARY E. MILES and MATTIE GROVES,

Plaintiffs-Appellants,

vs.

COUNTY OF GALLATIN, ILLINOIS,

Defendants-Appellee.

Appeal from the

Circuit Court of

Gallatin County

STONE, J.

This is an action at law instituted in the Circuit Court of Gallatin County by Henry McDowell, Doshia Boyer, Eura Switzer, Nannie Bradley, Alice Winters, George DuVall, Mary E. Miles and Mattie Groves, Plaintiffs-Appellants, against the County of Gallatin, to recover a balance alleged to be due each of them, on blind pensions, beginning October 1, 1940 to October 1, 1943.

It appears that this suit is based upon a statute of the State of Illinois, entitled, "An Act for the Relief of the Blind", approved May 11, 1903, which statute provided for a reasonable subsistence compatible with health and well-being to be paid by counties, to blind persons, such sums not to exceed Forty dollars a month. This statute was repealed by an Act approved July 9th, 1943, by which Act the State took the responsibility upon itself of administering the Act and of paying the recipients thereunder.

A motion filed by Appellee, to dismiss the fourth amended complaint, was sustained by the trial court on January 26, 1946, and the appeal is taken on the sustaining of that motion. At no

1.

FILED

OCT 4 1946

Stanley B. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

place in the record do we find a final order from which an appeal would lie to this court. The appeal seems to be from the minutes of the trial judge. The court's minutes are no part of a record on appeal and the reviewing court should dismiss a case where the record fails to show a judgment entered of record in the trial court. People ex rel, Holbrook vs. Petit, 266 Ill. 628; Fitzsimmons et al vs. Munch, 74 Ill. App. 279; Lindblom et al vs. Purity Ice and Refrigerating Co. 217 Ill. App. 306; Metzger et al vs. Morley 83 Ill. App. 113.

We find no assignment of errors in the brief filed by Appellant. After stating under the heads, "Statement" and "Brief" certain propositions and citing certain decisions, Appellants continue with an argument of several propositions, mostly to the effect that, under the statute in question, the pension is a vested right. At no place in the brief, is there any statement to the effect that the trial court erred in anything done or failed to be done.

The rules of this Court provide under Rule 9, "*****The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for reversal *****". For the formal assignment of errors attached to the record, the Civil Practice Act substitutes the requirement of a statement in the brief of the errors relied upon for reversal and this reasonable requirement is jurisdictional and appeal will be dismissed where there is no attempt to comply with this requirement. Ill. Rev. Stats., 1937, Chap. 110, Par. 259.36; 259.39; Gyure vs. Sloan Valve Co. 367 Ill. 489.

There has been no attempt to comply with the statute or the rules of this court. A substantial compliance with these rules is essential to an orderly disposition of the business of the court. It is not the duty of the court to search the record

for the matters material to the disposition of the contested issues, but it is the duty of the attorney to point out wherein the lower court has erred in the trial of the cause. The appeal will be dismissed.

Abstract

APPEAL DISMISSED.

PRESIDING JUSTICE CULBERTSON AND JUSTICE BARTLEY CONCUR

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MAY TERM, A.D. 1946

329 I.A. 514¹

Term No. 46M19

Agenda No. 5

PAMBOUK HACHADOURIAN, LOUISIG
SAFERIAN, BILL SAFERIAN,
MARIAM TATORIAN and JOHN
TATORIAN,

Plaintiffs-Appellees,

vs.

DICK BOGOSIAN, SUSIE BOGOSIAN
and DICK BOGOSIAN, Executor of
the Last Will and Testament of
Almast Bogosian, Dec. and AUG
M. EGGMANN, Trustee,

Defendants-Appellants.

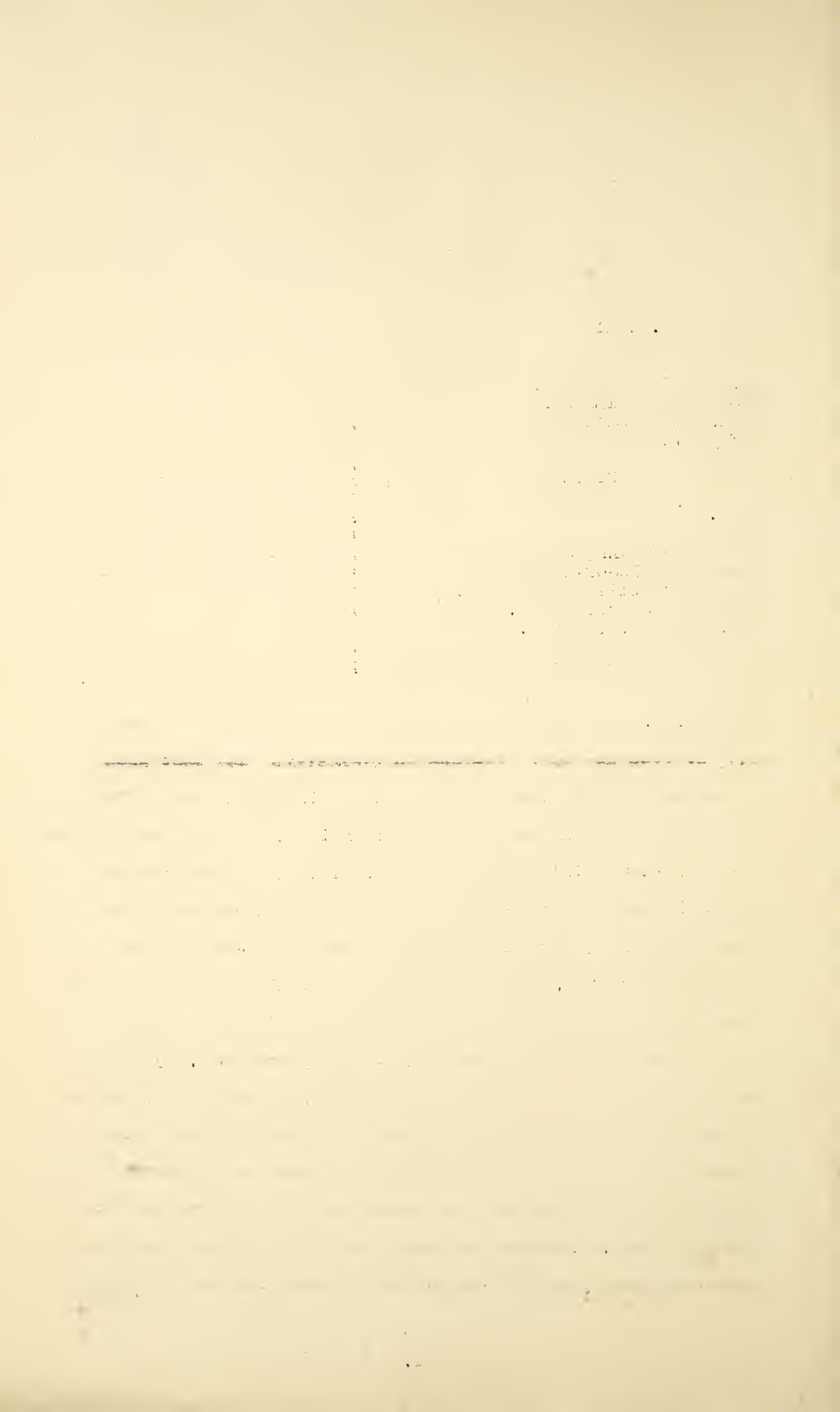
Appeal from the

Circuit Court of

St. Clair County

STONE, J.

Pambouk Hachadourian, Louisig Saferian, Bill Saferian, Mariam Tatorian and John Tatorian, Plaintiffs-Appellees, who will in this opinion be called plaintiffs, filed their suit in equity in the Circuit Court of St. Clair County, against Dick Bogosian, Susie Bogosian, and Dick Bogosian, Executor of the Last Will and Testament of Almast Bogosian, Deceased and Aug M. Eggmann, Trustee, Defendants-Appellants, who will in this opinion be called defendants, and also against other defendants who were thereafter dismissed from the proceeding. The amended complaint alleged that the deed by which defendant, Dick Bogosian claimed title to the premises involved in the proceeding was procured by fraud as to all of plaintiffs, on the ground that no part of the consideration for the alleged transfer of title was paid to them, or received by them, and also that the purported signatures of two of the plaintiffs appearing on the deed were



not placed thereon by them nor any one at their direction and were forgeries.

The issue in the cause was made by the amended complaint and defendants' answer. The cause was referred to the Master in Chancery, who after a hearing, filed his report in which he found that no part of the consideration had been paid plaintiffs, and that the signatures by mark of two of the plaintiffs appearing on the deed were not the genuine signatures by mark of said two plaintiffs and recommended a decree in accordance with his findings.

Objections to his report were overruled and ordered to stand as exceptions. These were argued before the Chancellor and were also overruled. The decree entered by the court, after making findings of fact conforming to those of the Master in Chancery, ordered defendants to pay within thirty days the sum of Twenty-eight hundred dollars with interest from November 5, 1937, at five per cent, thereon to plaintiffs, and that upon failure of defendants so to do, that the deed in question be cancelled and set aside as a cloud on the title of plaintiffs and the fee simple title to the premises involved be confirmed in plaintiffs, Pambouk Hachadourian, Louisig Saferian and Mariam Tatorian. Appeal was taken from this decree direct to the Supreme Court of Illinois, and subsequently transferred to this court.

It appears that the parties in this cause are Armenians; that none of the plaintiffs can read or write English, excepting John Tatorian, who appears to be able to write his own name. Pambouk Hachadourian had been married in Asia to one Hampartz Kalajian, by whom she had a daughter Almast, who later married defendant Dick Bogosian. After the death of Hampartz Kalajian, Pambouk married Kasper Hachadourian, by whom she had two



daughters Mariam Tatorian and Louisig Saferian.

At the time of his death, Kasper Hachadourian owned the premises in question. He died intestate, his heirs being his widow, Pambouk and his daughters Mariam Tatorian and Louisig Saferian. After the death of Almast, wife of Dick Bogosian, the latter approached the family with reference to a purchase of the premises. It is claimed on behalf of plaintiffs that defendant, Dick Bogosian represented to plaintiffs that in order to have the fee simple title to the premises vest in Pambouk Hachadourian, it would be necessary to have the heirs of Kasper Hachadourian join in a deed of said property to a third party, who would then execute a deed to Pambouk Hachadourian; that because of such representations plaintiffs Pambouk Hachadourian, Louisig Saferian and Bill Saferian signed a warranty deed on November 5, 1937 to Dick Bogosian, but plaintiffs Mariam Tatorian and John Tatorian did not sign said deed, and that their mark or signature thereon were forgeries and that ~~no~~ consideration was given for said deed. Defendant claims that he paid the purchase price of \$2800.00 in full and that each of plaintiffs signed the deed by mark, in the presence of witnesses.

On the part of defendants, it is urged as error that the decree is contrary to the manifest weight of the evidence, and the plaintiffs failed to prove their case by the preponderance of the evidence. Pambouk Hachadourian testified that she received no money, and that the real estate man (Eggman) grabbed her hand and put a cross on the deed. Louisig Saferian testified that she put her cross on the deed but received no money, nor did any one else. She is corroborated by her husband Bill Saferian who testified in addition that it was agreed that the property was worth \$2800.00 above the mortgage. They also testified that upon John Tatorian being asked to sign the paper, he left with

it, for the purpose of seeking information thereon. Upon coming back he stated that he would not sign. Both John Tatorian and his wife, Mariam Tatorian testified that they did not sign by placing a mark on the deed, and received no money. John Tatorian also testified that he was able to sign his own name.

Aram H. Bagdorian, produced as a witness by plaintiffs, testified that he understood English, that he had known defendant, Dick Bogosian, and had been employed by him in 1937; that he wrote his name as witness to the mark of John Tatorian, in response to the request of Bogosian, at which time Tatorian was not present, and that at no time he saw Tatorian make his mark, and that at no time did he see \$700.00 paid to either John or Mariam Tatorian.

Theodore A. Eggman testified that he was in the real estate business in East St. Louis, and on November 6, 1937 in company with his father, now deceased, saw all of the plaintiffs and defendant Dick Bogosian; that he witnessed the marks of all of them; that he saw money there, but did not recall who got it.

Dick Bogosian, in his own behalf testified that plaintiffs wanted \$2800.00 for the property and he offered \$2100.00; that John Tatorian left the meeting, the night of November 6, 1937, and then came back, refusing to sign, and that the next day in the presence of Louisig Saferian, Pambouk Hachadourian, and Aram Bagdorian, he paid John Tatorian his \$700.00, whereupon Tatorian signed the deed and Bagdorian witnessed his mark, and that thereafter the group went back to Pambouk and she was paid, as was Louisig, thereby contradicting his own witness, Eggman, who testified that they all signed at the same time, and had no recollection of any one leaving the meeting.

Counsel for defendants repeatedly call the Court's attention to the fact that the Master in Chancery in his report said that he

[illegible]

had read the testimony with much difficulty, and that the Chancellor made the observation that he had read the record with much difficulty, that it is a legitimate inference therefore that the testimony of plaintiffs was so confused and uncertain that it could not possibly support the decree. We do not draw that inference either from the remarks of the Master, the Chancellor, or the record.

The weight of the testimony of plaintiffs, as of all the testimony in the case, was for the trial court. The decree of the Chancellor when based upon approved findings of fact by a Master, will not be disturbed on appeal, unless it is manifestly against the weight of the evidence. *Stauffenbiel vs. Stauffenbiel*, 388 Ill. 511; *Osgood vs. Zieze*, 388 Ill. 226; *Stasch vs. Romza* 387 Ill. 67; *Kuflik v. Kwasny*, 383 Ill. 354; *Fisher v. Burgiel*, 382 Ill. 42; *Mruk vs. Mruk* 379 Ill. 394, *Pasedach v. Auw*, 364 Ill. 491, *Keuper v. Mette*, 239 Ill. 586.

The Chancellor saw and heard the witnesses testify and had the opportunity to observe their demeanor and conduct upon the witness stand, and was in much better position to judge whether their testimony was worthy of belief than we are from a perusal of the record. We cannot say that it did not justify him in entering this decree. The decree of the Circuit Court will be affirmed.

AFFIRMED.

PRESIDING JUSTICE CULBERTSON AND JUSTICE BARTLEY CONCUR

Abstract

FILED

OCT 21 1946

Stanley R. Brown

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

4

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

OCTOBER TERM, A. D. 1946

General
No. 9509

Agenda No. 4

Pearl Brosie,
Appellee-~~and~~ Cross Appellant,
vs.
George Brosie,
Appellant-~~and~~ Cross Appellee.)

329 I.A. 514²

Appeal from Circuit Court
of Pike County, Illinois.

Wheat, J.

The decree of the Circuit Court granted a divorce to plaintiff, awarded to her the custody of the couple's three year old boy, directed the payment to her of \$8000 in a lump sum, \$50 a month for alimony and \$25 a month for child support, allowed plaintiff's attorney fees in the sum of \$800, and taxed costs against defendant. Defendant husband appeals from all of such decree except the provision as to child custody. Plaintiff wife appeals from that part of the decree directing the payment to her of \$8000, claiming its insufficiency as to amount.

The complaint charged numerous acts of extreme and repeated cruelty. It is sufficient to state that the finding of the trial court as to this issue does not appear to be against the manifest weight of the evidence. As is always true, the findings of the chancellor, who saw the witnesses and heard them testify, will not be disturbed by the reviewing court, unless such findings are clearly opposed to the manifest weight of the evidence or unless it is apparent that error has been committed.

toasted

STATE OF CONNECTICUT

17005 CALIFORNIA

OCTOBER TERM, A. D. 1946

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

1470

1902-1903

125

• • • † 13-6

[illegible][illegible]

As to the allowance to the wife of the lump sum payment of \$8000 and a monthly payment of \$75, the husband objects to the award as being unauthorized by the law and the pleadings, and unsupported by the proofs. The complaint, as amended, alleges that since the marriage, plaintiff has substantially contributed to the family accumulation of money and other property through her work in the fields and assisting in the management of the farm business, by reason of which, she asserts she has an actual interest in the property accumulated since such marriage, and asks for an accounting. In addition to this, there appears the usual prayer that the defendant be ordered to pay a reasonable sum for the support of herself and child and for such other and further relief as shall be ^{made} ~~made~~ and proper. Section 18, Chapter 40, Illinois Revised Statutes 1945, provides as follows: "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable." Section 19 provides in part: "When a divorce shall be decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just; * * *" Under these two sections, the court clearly has the equitable power to provide for the maintenance of the wife and child, either by the awarding of a lump sum payment or by monthly payments or by both. (Martin vs. Martin, 195 Ill. App. 32)

It remains to be seen whether or not the proof justifies the judgment of the trial court. Although, as is always true, there appears to be some conflict as to the value of the assets

As to the allowance to the wife of the husband deceased of 1000 and a weekly payment of 10, the husband's estate to the wife as before mentioned by the law and the evidence, and was granted by the court. The complaint, as amended, alleges that since the marriage, defendant has been guilty of the family accommodation of money and other property through her wife in the United States and abroad in the management of the law business, in person or through others, and thereby has an interest in the property accumulated since such marriage, and asks for an accounting. In addition to this, there appears the usual prayer that the defendant be ordered to pay a reasonable sum for the support of herself and child and the wife of her husband. Further relief was asked ^{There} and was granted. Section 1. The following Illinois Revised Statutes 1885, Chapter 10, Section 10, is hereby enacted: "Every divorce is granted, it is shall extend to the point that either party holds the title to property acquired before the divorce. The court may not of consequence thereof to be made in the party entitled to the same, and such terms as it shall deem proper. Section 10. It is hereby enacted that in any divorce trial be granted. The court may make such order regarding the property and maintenance of the wife or husband, the wife, husband and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be just, reasonable and fair; and under these conditions, the court shall have the authority power to provide for the maintenance of the wife and child, either by the husband or a sum for support or by monthly payments to the wife. (Section 10, Illinois Revised Statutes 1885, Chapter 10, Section 10.)

It remains to be seen whether or not the court's decision in the instant case is correct. It is believed that the court's decision is correct, and that the wife is entitled to the property accumulated since the marriage, and to an accounting of the same. The court's decision is based on the fact that the husband has been guilty of the family accommodation of money and other property through his wife in the United States and abroad in the management of the law business, in person or through others, and thereby has an interest in the property accumulated since such marriage, and asks for an accounting. In addition to this, there appears the usual prayer that the defendant be ordered to pay a reasonable sum for the support of herself and child and the wife of her husband. Further relief was asked and was granted. Section 1. The following Illinois Revised Statutes 1885, Chapter 10, Section 10, is hereby enacted: "Every divorce is granted, it is shall extend to the point that either party holds the title to property acquired before the divorce. The court may not of consequence thereof to be made in the party entitled to the same, and such terms as it shall deem proper. Section 10. It is hereby enacted that in any divorce trial be granted. The court may make such order regarding the property and maintenance of the wife or husband, the wife, husband and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be just, reasonable and fair; and under these conditions, the court shall have the authority power to provide for the maintenance of the wife and child, either by the husband or a sum for support or by monthly payments to the wife. (Section 10, Illinois Revised Statutes 1885, Chapter 10, Section 10.)

at the time of the separation of the parties. The couple was married February 7, 1929, at which time the defendant was the owner of an 80-acre farm, with a small amount of livestock and farm machinery. It appears that this constituted practically all of his assets. During the subsequent sixteen years, this home farm was substantially improved and the financial condition of the family was advanced considerably, all of which, from the testimony, was due to the joint efforts of husband and wife. Nineteen witnesses, in addition to the parties themselves, testified as to various types of work performed by the wife, from which it appears that she acted not only in the capacity of a farm wife but also carried on the work which would ordinarily be done by a hired man. Without household help of any kind, she took care of the housework, worked side by side with her husband in shucking corn, helped mend fence, assisted in the loading of livestock, did the milking, plowed corn, helped with the sheep shearing, assisted in the vaccination of livestock, did the chores, pitched hay, herded sheep, planted corn, shocked oats, mixed concrete, and dug post holes. In addition to this, she kept all of the farm accounts such as keeping all records of the sale of livestock and other receipts and expenditures. By reason of her efforts, far beyond those of an ordinary housewife, it is obvious that she contributed substantially to the accumulation of the property on hand at the time of the separation. On such latter date it does appear, without dispute, that there was on deposit in the name of the defendant the sum of \$9600; that there was on hand and produced in open court, three fruit jars and a sack containing \$3498.60; that

[illegible]

the 80-acre farm which defendant owned at the time of the marriage has been considerably improved during the subsequent sixteen years, out of earnings from the farming operations; that an additional 100-acre farm has been bought since the marriage, title being in the name of defendant; that since the separation of the parties, defendant sold a considerable amount of property, at least of the value of \$2000, and thereafter had on hand a very considerable amount of livestock, grain, and chattel property. In addition to this, there is credible testimony that defendant, at the time of the separation, had in his possession in fruit jars or sacks an additional \$4000 which was not accounted for in the proceedings before the trial court. Witnesses, including the parties, testified as to certain values. As to the 80-acre farm owned by the defendant at the time of the marriage, the defendant's testimony is that it is worth \$4000, whereas other witnesses placed a value as high as \$10,000. As to improvements, the testimony varies between \$2000 and \$3000. As to the 100-acre farm acquired since the marriage, the defendant has placed a value of \$5000 on this, whereas other witnesses have appraised it as high as \$7000 to \$8000. The testimony indicates that the livestock and other chattel property on hand at the time of the separation was worth approximately \$5000. In our opinion, a fair analysis of the testimony indicates that at the time of the separation, the following values are applicable: bank deposit-\$9600; money in fruit jars and sacks-\$7500; livestock, etc.-\$5000; improvements to the 80-acre farm subsequent to the marriage-\$2000; value of the 100-acre farm acquired since the marriage-

the 100-acre farm which defendant owned at the time of the
testimony has been considerably improved during the intervening
years, and of earnings from the farming operations;
that an additional 100-acre tract has been bought since the
testimony, this being in the name of defendant; that also
the restoration of the parties, defendant said is considerable
amount of money, at least of the value of \$100,000, and there-
after had on hand a very considerable amount of livestock, real
and chattel property. In addition to this, there is testimony
testimony that defendant, at the time of the deposition, had
in his possession in California some or several hundred thousand
dollars was not accounted for in the proceedings before the trial
court. Witness, including the parties, testified as to certain
values. As to the 100-acre farm owned by the defendant at the
time of the testimony, the defendant's testimony is that it is
worth \$40,000, whereas other witnesses placed a value as high as
\$10,000. As to the 100-acre farm purchased since the
testimony, the defendant has placed a value of \$20,000 or \$30,000,
whereas other witnesses have placed it as high as \$100,000;
the testimony indicates that the livestock and other
property owned on date of the trial of the defendant was
worth approximately \$500,000. In one witness, a bill receipt
of the parties indicates that at the time of the restoration
the following values are indicated: real property, \$100,000;
livestock, \$100,000; and other property, \$100,000.
In testimony to the 100-acre farm purchased to the parties
since the testimony of the 100-acre farm purchased since the testimony

\$6000; making a total of \$30,000. In addition to this, the defendant has title to the 80-acre farm owned by him at the time of the marriage, on which he places a value of \$4000.

In view of these findings, it is our belief that the trial court did not abuse its discretion nor act erroneously in awarding to the plaintiff a lump sum payment of \$8000 and a monthly award of \$75 for herself and child. The trial court did not, however, in the decree make any finding as to whether or not this was in full of all of the wife's interest, such as the inchoate right of dower, homestead, and any other rights she may have acquired by reason of the marital relationship. To be effective as a complete settlement of the property rights of the parties in existing assets, it is deemed equitable that in consideration of the lump sum payment as well as the monthly allowance, the plaintiff ought to be required to release all claim in and to all of the real estate now standing in the name of the defendant, ~~except to the extent that such real estate might be subjected to any lien based upon the monthly award.~~ The plaintiff has assigned as cross-error the insufficiency of the lump sum payment of \$8000. We believe the trial court acted equitably in awarding this sum.

Objection is made to the allowance by the court of the sum of \$800 to be taxed as costs as fees for the attorney for the plaintiff. The trial court was familiar with the extent and necessity of the numerous pleadings and the time and effort expended by counsel for plaintiff, and in view of the financial standing of the parties, we cannot say that this allowance was an abuse of discretion by the trial court, nor can it be said that the costs should not have been taxed against the defendant.

...total of \$20,000. The witness is sure, the
defendant was killed on the 21st of June 1900, at the
time of the marriage, on which he passed a check of \$2000.
In view of these facts, it is not believed that
the trial court has shown the defendant not to be
in possession of the money at the time of the trial and a
verdict award of \$20,000 for the estate of the wife.
It is, however, to be borne in mind that the witness
did not see the money until it was paid to the wife's
two children, the son and daughter, and that the witness
has been advised by reason of the marital relationship
attested as a complete settlement of the property rights of the
marriage in relation to the money, it is deemed advisable that in
connection of the law and regard as well as the marital
relationship, the witness should be required to release all
rights in and to all of the real estate now standing in the name
of the defendant, ~~which is the same as the real estate~~
~~of the defendant, which is the same as the real estate~~
The witness has assigned an assignee, the assignee of
the law and regard of the law. The witness who trial court asked
especially in relation to the law.
The witness is sure that the witness is the owner of
the sum of \$20,000 to be paid to the wife for the attorney
for the estate. The trial court was familiar with the extent
and necessity of the necessary expenses and the law and effort
attended by counsel for the estate, and in view of the financial
condition of the parties, we should say that this allowance was
no more or less than the trial court, nor can it be said
that the estate should not have been taxed against the defendant.

It is noted that the decree makes the monthly payments of \$75~~400~~ a lien on the real estate of the defendant. Because of the lump sum award to the plaintiff we feel this provision as to the lien places an undue burden and hardship on the defendant in and about the management of his affairs. In addition there is no evidence to indicate possible future financial instability on his part or that he might squander and waste his assets. To this extent the decree should be modified.

The decree is affirmed as to the granting of the divorce, the awarding to the plaintiff of the child's custody, the allowance of attorney's fees, and the taxing of costs, but is reversed as to the provision making the monthly payments a lien on the real estate and remanded for modification as to this. In the event the plaintiff files in the Circuit Court a release of all of her rights arising out of the marital relationship, in and to the real estate now owned by the defendant, within thirty days from the filing in the Circuit Court of the mandate of this court, then such decree is further affirmed as to the provision for the payment of \$8000. In the event such release is not so filed, then this cause is remanded to the Circuit Court for the further purpose of considering the division of property and the awarding of alimony and support money. Costs are to be taxed against appellant.

Affirmed in part and
conditionally affirmed in
part, subject to directions,
and reversed in part with
directions.

It is noted that the record shows the monthly payments

of \$100 a month on the first mortgage of the defendant. Because of the fact that the plaintiff feels this provision is to the disadvantage of the defendant and her heirs in the event of the death of the defendant, it is suggested that the plaintiff be allowed to have the mortgage paid off by the defendant or her heirs. In addition there is no evidence as to whether the mortgage is a valid one or not. It is suggested that the mortgage be paid off by the defendant or her heirs.

The record is silent as to the granting of the divorce, but it is noted that the plaintiff is the wife of the defendant. It is suggested that the plaintiff be allowed to have the mortgage paid off by the defendant or her heirs. In addition there is no evidence as to whether the mortgage is a valid one or not. It is suggested that the mortgage be paid off by the defendant or her heirs. The record is silent as to the granting of the divorce, but it is noted that the plaintiff is the wife of the defendant. It is suggested that the plaintiff be allowed to have the mortgage paid off by the defendant or her heirs. In addition there is no evidence as to whether the mortgage is a valid one or not. It is suggested that the mortgage be paid off by the defendant or her heirs. The record is silent as to the granting of the divorce, but it is noted that the plaintiff is the wife of the defendant. It is suggested that the plaintiff be allowed to have the mortgage paid off by the defendant or her heirs. In addition there is no evidence as to whether the mortgage is a valid one or not. It is suggested that the mortgage be paid off by the defendant or her heirs.

Witnessed in my hand and
officially attested in
my office, this 10th day of
January, 1910, at New York
City, New York.

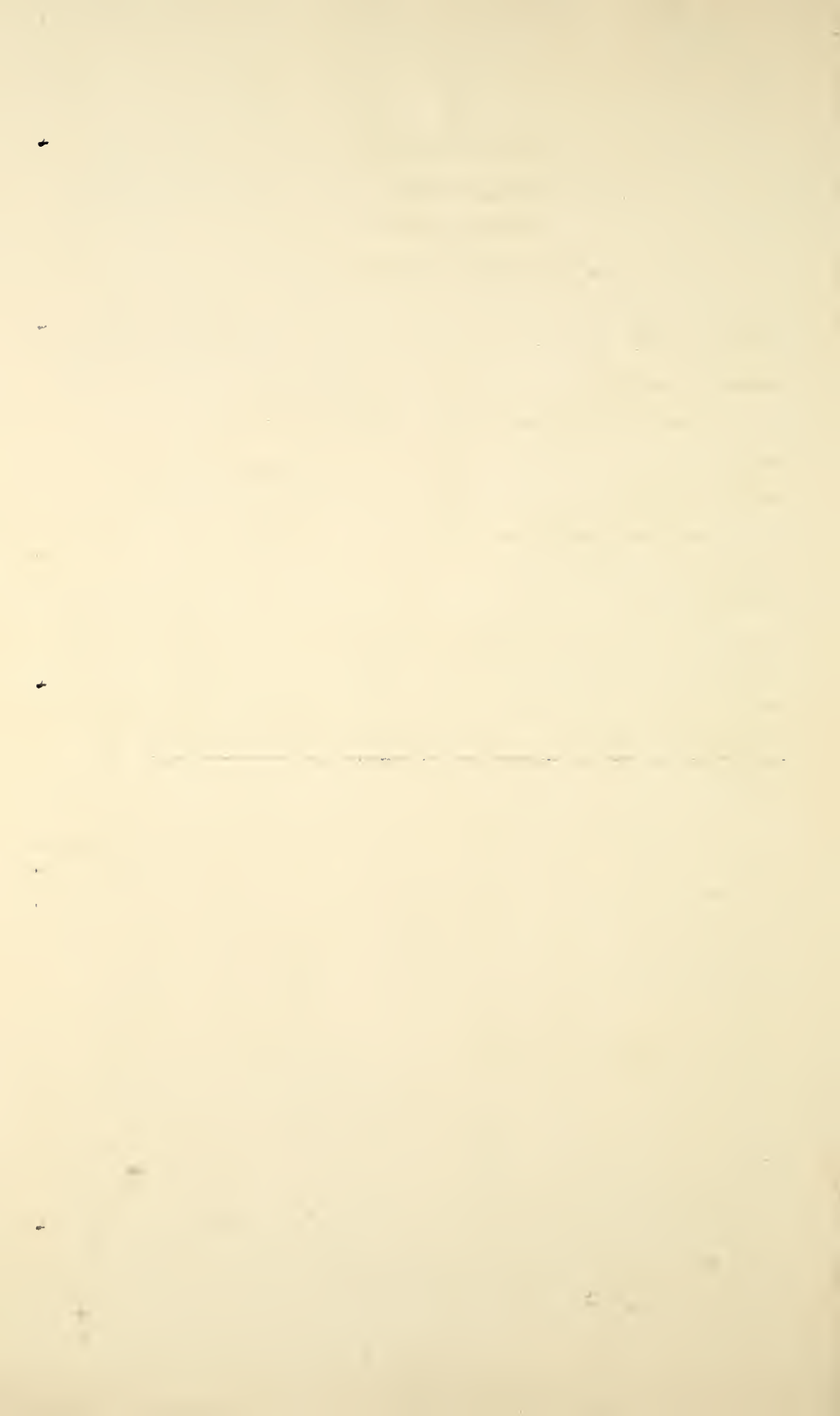
25/3 A

Agenda No. 10

329 I.A. 532
Appeal from the
City Court of the
City of East St. Louis,
Illinois

This is an appeal from a decree of the City Court of East St. Louis, Illinois, entered on January 28, 1946, in a proceeding wherein Appellee, LAZETTA GODFREY, was the petitioner, and ALBERT GODFREY, Appellant, was the party against whom the relief was sought.

1.



The prayer of the petition filed by Mrs. Godfrey, which was denied by the City Court, was as follows: "Asks that this matter may be set down for hearing, and upon a hearing said decree heretofore entered in said cause ordering and decreeing the defendant to pay to the petitioner herein the said sum of \$75.00 per month may be modified and the defendant ordered to pay to the petitioner the sum of \$200.00 per month for her support and maintenance."

After the petition for rehearing was denied a certified copy of the reverse and remanding order was secured from the Clerk of this Court and due notice given, as by law provided, that Mrs. Godfrey would appear on August 7, 1945 before the City Court of East St. Louis and file in the office of the Clerk of said City Court said certified copy of the reverse and remanding order in said cause. This action was taken by Mrs. Godfrey, and on October 9, 1945 she filed her petition for allowance of attorney fees, and on the same day the defendant filed a motion to strike the petition for the allowance of attorney fees. A hearing was had before the Court on the petition for allowance of attorney fees and after testimony had been taken, an order was entered on January 28, 1946 allowing Mrs. Godfrey's motion for attorney fees and fixing same in the amount of \$1,000.00, and at the same time the Court entered its amended decree for separate maintenance, in accordance with the opinion and mandate of this Court, and in accordance with the petition which had been filed by Mrs. Godfrey on January 29, 1944. It is from these orders that the Appellant now perfects this appeal.

The portions of the decree of January 28, 1946 against which particular complaint was made are (First), that portion of the decree which ordered Appellant to pay to Appellee the sum of \$2125.00, calculated by the product of \$125.00 per month for the number of months intervening between September 1, 1944, the first

calendar month following the date of the original decree, and the date of the entry of the decree appealed from; and (Second), that portion of the order of the City Court which ordered Appellant to pay to Appellee for the use of her attorney the sum of \$1,000.00 for his services rendered in her behalf on said former appeal and the months subsequent, which consisted of matters leading up to the entry of the decree of January 28, 1946.

It appears to us that the amended decree entered in this cause by the City Court of East St. Louis on January 28, 1946 is in accordance with the opinion of this Court, rendered on March 5, 1945, and said Court having proceeded in strict conformity to the mandate as issued, the first contention advanced by the Appellant herein must, of necessity, not prevail (MUHLKE v. MUHLKE, 285 Ill. 325, 330). The cause having been remanded to the Trial Court, "With directions to enter a decree allowing Appellant's Petition" the lower Court had no discretion in the matter and was required to enter an order accordingly (TRUSTEES OF SCHOOL vs. HOYT, 318 Ill. 60; WOLKAU vs. WOLKAU, 217 Ill. App. 471, 474).

As to that contention which is advanced against the allowance of attorney fees on the ground that same are unreasonable for the services performed, an examination of the record in this matter discloses that the Court had before him for consideration, with other testimony, the testimony of Mrs. Godfrey and two practicing attorneys, one of whom testified that \$1,000.00 was a reasonable fee, and the other that \$1500.00 was a reasonable fee. There was no evidence presented to the contrary. The amount of an allowance for attorney fees rests largely in the discretion of the chancellor and will not be disturbed unless the chancellor has clearly exceeded his discretion (PORTER vs.

PORTER, 162 Ill. 398; GLYNN vs. GLYNN, 159 Ill. App. 185, 189).

We are not disposed to hold that the chancellor in any wise exceeded his discretion in this matter.

The contentions advanced by the Appellant herein cannot prevail and the decree of the City Court of East St. Louis is hereby, accordingly, affirmed.

Affirmed.

ABSTRACT

JUSTICE STONE AND JUSTICE BARTLEY CONCUR.

FILED

OCT 15 1946

Stanley R. Brown

CLERK OF THE APPellate COURT
FOURTH DISTRICT OF ILLINOIS

43700

In the Matter of the estate of
H. C. BERTHOLD WETSTONE,
Deceased.

WALTER C. AVERY, Executor of the
estate of H. C. BERTHOLD WETSTONE,
deceased, and LOUIS D. MOORHEAD,
Appellees,

v.

MARTHA GEORGE, IDA W. GLOEDE,
EDWARD PRESSLER, MARY GRAHS,
DAVID C. PRESSLER and JOHN G.
PRESSLER,
Appellants.

329 I.A. 533

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

THERE HEARD ON APPEAL FROM
PROBATE COURT OF COOK
COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Martha George, Ida W. Gloede, Edward Pressler, Mary Grahs, David C. Pressler and John G. Pressler, seek to reverse a decree of the Circuit court of Cook county finding that they are not the heirs at law or next of kin of H. C. Berthold Wetstone, deceased, and that the deceased left him surviving no known heirs at law or next of kin.

The record discloses that Wetstone died January 10, 1944, a resident of Chicago, Cook county, Illinois, leaving a will dated September 25, 1941. The will named Walter C. Avery as executor and after making two bequests of \$1,000 each, the residue of the estate, which it is said amounts to about \$70,000 or \$75,000 was left to Louis D. Moorhead. A petition to have the will admitted to probate was filed in the Probate court of Cook county, in which it was set up that Wetstone left him surviving unknown heirs or heirs at law whose name or names or addresses were unknown and could not be found upon diligent search. Thereupon an order was entered by the Probate court appointing David J. A. Hayes as referee for the purpose of ascertaining who, if any, were the heirs of the deceased at the time of his death. After-

In the Matter of the estate of
H. C. BERTHOLD WESTONE,
Deceased.

WALTER G. AVERY, Executor of the
estate of H. C. BERTHOLD WESTONE,
deceased, and LOUIS D. MOORHEAD,
Appellees,

v.

MARTHA GEORGE, IDA W. GLOBE,
EDWARD PRESSLER, MARY GRAHS,
DAVID C. PRESSLER and JOHN G.
PRESSLER,
Appellants.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Martha George, Ida W. Globe, Edward

Pressler, Mary Grahs, David C. Pressler and John G. Pressler,

seek to reverse a decree of the Circuit court of Cook county

finding that they are not the heirs at law or next of kin of

H. C. Berthold Westone, deceased, and that the deceased left

him surviving no known heirs at law or next of kin.

The record discloses that Westone died January 10, 1944,

a resident of Chicago, Cook county, Illinois, leaving a will

dated September 25, 1941. The will named Walter G. Avery as

executor and after making two bequests of \$1,000 each, the

residue of the estate, which it is said amounts to about

\$70,000 or \$75,000 was left to Louis D. Moorhead. A petition to

have the will admitted to probate was filed in the Probate court

of Cook county, in which it was set up that Westone left him

surviving unknown heirs or heirs at law whose name or names or

addresses were unknown and could not be found upon diligent search.

Thereupon an order was entered by the Probate court appointing

David J. A. Hayes as referee for the purpose of ascertaining who, if

any, were the heirs of the deceased at the time of his death. After-

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

THERE HEARD ON APPEAL FROM
PROBATE COURT OF COOK
COUNTY.

3291.A.333

2.

ward the referee made and filed his report which found, in substance, that the deceased left no heirs or heirs at law. An order was entered by the Probate court approving the referee's report finding that the deceased left no heirs. March 16, 1944, the will was admitted to probate by the Probate court of Cook county and letters testamentary were issued to Avery who qualified and entered upon the discharge of his duty. About 8 months thereafter, viz., November 22, 1944, Martha George and the other parties who are appealing here, filed their petition in the Probate court of Cook county claiming they were the only heirs at law and next of kin of the deceased, being the second maternal cousins and praying that the matter be again referred to Referee Hayes, a hearing had and that the order of the Probate court theretofore entered, finding that the deceased left no heirs, be set aside and vacated, and that they be found to be the only heirs at law of the deceased. An order was entered again referring the matter to the referee, there was a hearing, the referee took the evidence, made up his report and found that Martha George and the other parties named were the second maternal cousins of the deceased, and recommended that the order theretofore entered, finding that the deceased left no heirs, be vacated and set aside. Objections were filed to the report, they were overruled; the Probate court approved the report and entered judgment accordingly and the executor and Moorhead appealed to the Circuit court of Cook county, where there was a hearing, evidence introduced by both sides, and as above stated, the court found and decreed that Wetstone died leaving no known heirs at law. This appeal followed.

There is but one question involved in this appeal and that is one of fact - whether the evidence discloses that Mrs. George and the others appealing, are second maternal cousins of the deceased. The court held that they were not.

Hereafter we will refer to the parties as the heirs, and

ward the referee made and filed his report which found, in substance, that the deceased left no heirs or heirs at law. An order was entered by the Probate court approving the referee's report finding that the deceased left no heirs. March 16, 1944, the will was admitted to probate by the Probate court of Cook county and letters testamentary were issued to Avery who qualified and entered upon the discharge of his duty. About 8 months thereafter, viz., November 22, 1944, Martha George and the other parties who are appealing here, filed their petition in the Probate court of Cook county claiming they were the only heirs at law and next of kin of the deceased, being the second maternal cousins and praying that the matter be again referred to Referee Hayes, a hearing had and that the order of the Probate court theretofore entered, finding that the deceased left no heirs, be set aside and vacated, and that they be found to be the only heirs at law of the deceased. An order was entered again referring the matter to the referee, there was a hearing, the referee took the evidence, made up his report and found that Martha George and the other parties named were the second maternal cousins of the deceased, and recommended that the order theretofore entered, finding that the deceased left no heirs be vacated and set aside. Objections were filed to the report, they were overruled; the Probate court approved the report and entered judgment accordingly and the executor and respondent appealed to the Circuit Court of Cook county, where there was a hearing, evidence introduced by both sides, and as above stated, the court found and decreed that testator died leaving no heirs at law. This appeal followed.

There is but one question involved in this appeal and that is one of fact - whether the evidence discloses that George and the other appealing, are second maternal cousins of the deceased. The court held that they were not.

Hereafter we will refer to the parties as the heirs, and

3.

the estate.

There is no dispute in the evidence but that the deceased was a barber and had operated a shop in the Loop of Chicago for many years. His wife died in 1925 and there were no children born of the marriage.

The following witnesses were called by the heirs:

Richard F. Locke, a lawyer, testified that he was a customer of the deceased and on one occasion deceased talked about making a will. "I asked him if he had any relatives, and his reply was 'Only some cousins.'"

E. C. Stokburger testified that he was in the real estate business and lived in Glen Ellyn, Illinois; that he was a customer of the decedent and had known him intimately for the past 10 years; that he told him at the time his wife passed away that his only living relatives were cousins.

Arthur J. Stearnes testified that he lived in Elmhurst and was a real estate broker; that he had known the decedent from 1909 on; that he and the decedent were married to sisters; that the deceased spent about 5 nights a week "in my home between 1909 and 1912 and we talked of his cousins many times." That he met one of the cousins at the funeral of decedent's wife; that at that time "Mr. Wetstone came up with a lady and introduced me to her as Mrs. George, his cousin." The witness then pointed out Mrs. George in the courtroom; that he did not recall her name "at a former hearing." On cross examination he testified that this was about 1925; that counsel for the heirs brought "Mrs. George and Mrs. Berg out to Elmhurst the other evening."

Ruth Gagnepain testified that she knew the deceased - was a niece of his wife - daughter of the witness, Stearnes, who had just testified; that the funeral of the decedent's wife was v

the estate.

There is no dispute in the evidence but that the deceased was a barber and had operated a shop in the Loop of Chicago for many years. His wife died in 1925 and there were no children born of the marriage.

The following witnesses were called by the heirs: Richard F. Locke, a lawyer, testified that he was a customer of the deceased and on one occasion discussed about making a will. "I asked him if he had any relatives, and his reply was 'Only some cousins.'"

E. C. Stokburger testified that he was in the real estate business and lived in Glen Ellyn, Illinois; that he was a customer of the deceased and had known him intimately for the past 10 years; that he told him at the time his wife passed away that his only living relatives were cousins.

Arthur J. Stearns testified that he lived in Elmhurst and was a real estate broker; that he had known the deceased from 1909 on; that he and the deceased were married to sisters; that the deceased spent about 3 nights a week "in my home" between 1909 and 1912 and we talked of his cousins many times. That he met one of the cousins at the funeral of deceased's wife; that at that time "Mr. Peterson came up with a lady and introduced me to her as Mrs. George, his cousin." The witness then pointed out Mrs. George in the courtroom; that he did not recall her name "at a former hearing." On cross examination he testified that this was about 1925; that counsel for the heirs brought "Mrs. George and Mrs. Berg out to Elmhurst the other evening."

Ruth Gagnepain testified that she knew the deceased - a niece of his wife - daughter of the witness, Stearns, who had just testified; that the funeral of the deceased's wife was

4.

about 21 years ago, when the witness was about 12 years old. That "As the service ended we stood up and my uncle came toward us to my left side, and a lady came toward us on my right side and she said hello to me, and before I had spoken to her, she stooped down and kissed me, and I remember I was wondering who she was to stoop down and kiss me, and my uncle [the decedent] came toward me, and he said, 'Hello, Art. How are you?' to my father. And he said 'I want you to meet my cousin,' pointing to this lady, [Mrs. George] and he [the decedent] said, 'Ruth I want you to meet my cousin.'" And the decedent told Ruth that Mrs. George was his cousin; that although she had not seen Mrs. George since the funeral, a period of over 20 years, she recognized her in court. On cross examination she testified that counsel for the heirs came out to their house a few nights before the trial in the Circuit court and she then recognized Mrs. George who was with counsel. That she had not seen Mrs. George since Mrs. Wetstone's funeral in 1925 but she and her father often talked about the incident; that she remembered the woman (Mrs. George) remarking "that I looked like my aunt."

Helen M. Berg testified that she was a school-teacher in Chicago and a daughter of Martha George (one of the heirs.) That when she was given the prayer book by the decedent at the place where he roomed at that time, which was the latter part of 1939 or early in 1940, the decedent discussed with her and traced the relationship. She went back for a generation or two stating what the decedent told her of the heirs on the paternal and maternal side and mentioned about 50 persons that he named; that there was no written record of what he said at that time but she had talked it over a number of other times with her relatives.

We think it would serve no useful purpose to analyze the testimony of this witness further because it is most complicated and detailed.

The following witnesses were called by the estate:

about 21 years ago, when the witness was about 12 years old. That "As the service ended we stood up and my uncle came toward us to my left side, and a lady came toward us on my right side and she said hello to me, and before I had spoken to her, she stooped down and kissed me, and I remember I was wondering who she was to stoop down and kiss me, and my uncle [the decedent] came toward me, and he said, 'Hello, Art. How are you?' to my father. And he said 'I want you to meet my cousin,' pointing to this lady, [Mrs. George] and he [the decedent] said, 'Ruth I want you to meet my cousin.'" And the decedent told Ruth that Mrs. George was his cousin; that although she had not seen Mrs. George since the funeral, a period of over 20 years, she recognized her in court. On cross examination she testified that counsel for the heirs came out to their house a few nights before the trial in the Circuit court and she then recognized Mrs. George who was with counsel. That she had not seen Mrs. George since Mrs. Wetstone's funeral in 1925 but she and her father often talked about the incident; that she remembered the woman (Mrs. George) remarking "that I looked like my aunt."

Helen M. Berg testified that she was a school-teacher in Chicago and a daughter of Martin George (one of the heirs). That when she was given the prayer book by the decedent at the place where he roomed at that time, which was the last part of 1929 or early in 1940, the decedent discussed with her and traced the relationship. She went back for a generation or two stating what the decedent told her of the heirs on the paternal and maternal side and mentioned about 50 persons that he named; that there was no written record of what he said at that time but she had talked it over a number of other times with her relatives. We think it would serve no useful purpose to analyze the testimony of this witness further because it is most complicated and detailed.

The following witnesses were called by the estate:

5.

J. E. Wilmotte, an undertaker who conducted the funeral of the decedent's mother in 1913 and who filled out the death certificate at that time, testified further that Wetstone said he did not remember his mother's maiden name.

Willard A. Pease, a lawyer of 25 years standing, testified that he had known the decedent for about 30 years before his death; talked to him quite frequently; that decedent often told him he did not have anyone to whom he could leave his money; that he had no folks; that when decedent was in the hospital shortly before he died there were some flowers with a card on them; that he asked who had sent them and decedent replied that they were just some folks who had caused him a lot of trouble. On the card was written: "from Mrs. George and Helen Berg."

John W. Barrett, a Catholic priest and Archdiocesan and director of Catholic hospitals, testified that he had known decedent for about 9 or 10 years before his death; had seen him about once a month; that in 1942, when he drove decedent home from Dr. Moorhead's house, decedent told him he had no relatives except Dr. Moorhead; that decedent said that Dr. Moorhead's mother's maiden name was Schnell and his mother's name was Schnell.

Ella Dorman Hatch testified that in July, 1940, decedent told her he was alone in the world; that he had nobody except Dr. Moorhead.

Thomas J. Dwyer testified that he had known decedent for about 8 years before his death; that he met decedent at Dr. Moorhead's home in Oak Park and that in 1942 decedent told him he had no one in this world.

Joseph N. Shure testified that he lived in Oak Park and had known Dr. Moorhead since 1907; that he knew decedent and saw him often after 1935; that in February 1943, decedent told him that he had no living relatives.

J. A. Wilmette, an undertaker who conducted the funeral of the decedent's mother in 1913 and who filled out the death certificate at that time, testified further that Wetstone said he did not remember his mother's maiden name.

Willard A. Poore, a lawyer of 25 years standing, testified that he had known the decedent for about 30 years before his death; talked to him quite frequently; that decedent often told him he did not have anyone to whom he could leave his money; that he had no heirs; that when decedent was in the hospital shortly before he died there were some flowers with a card on them; that he asked who had sent them and decedent replied that they were just some folks who had caused him a lot of trouble. On the card was written: "from Mrs. George and Helen Berg."

John W. Barrett, a Catholic priest and Archdiocesan and director of Catholic hospitals, testified that he had known decedent for about 3 or 10 years before his death; had seen him about once a month; that in 1942, when he drove decedent home from Dr. Moorhead's house, decedent told him he had no relatives except Dr. Moorhead; that decedent said that Dr. Moorhead's mother's maiden name was Schnell and his mother's name was Schnell.

Elia Dorman Hatch testified that in July, 1940, decedent told her he was alone in the world; that he had nobody except Dr. Moorhead.

Thomas J. Dwyer testified that he had known decedent for about 8 years before his death; that he met decedent at Dr. Moorhead's home in Oak Park and that in 1942 decedent told him he had no one in this world.

Joseph W. Shure testified that he lived in Oak Park and had known Dr. Moorhead since 1907; that he knew decedent and saw him often after 1935; that in February 1943, decedent told him ~~that~~ he had no living relatives.

Geraldine Pavlinek testified that she had known the decedent since 1934; that in December 1941, decedent told her and her husband that he "was all alone." That all he had was Dr. Moorhead.

Frances S. Cummings, an Arbitrator on the State Industrial Commission, testified she had known decedent since 1913; had a conversation with him in August, 1942; that he told her at that time that the only relative he knew about was a grandfather who was born in Germany and that he never knew who his grandmother was.

Margaret White testified that she lived at 3037 Warren boulevard, Chicago; that decedent had roomed with her at that address for about 6 years; that in September 1941, Mrs. Berg and her mother, Mrs. George called on decedent in her home; that they came up to get some things he had promised them, the prayer book and towel and a table cloth; that decedent offered the witness the prayer book and she said she did not want it because she could not read German; that Mrs. Berg and her mother, Mrs. George, called at the house and asked for Mr. Wetstone and she let them in. On cross examination she said that they did not sneak in at the house but that she let them in; that she was not friendly with Mrs. Berg or her mother; that they bothered her and pestered her to death "they made plenty of visits to my home." That the decedent gave the prayer book to Mrs. George and Mrs. Berg at that time.

Photostatic copies of part of the prayer book are in the record, also a certificate by the pastor of St. Paul's Evangelical Lutheran Church, certifying that Thomas H. George and Martha Pressler were married August 22, 1894 and that the decedent was one of the witnesses; also a certificate by an official of the Wicker Park Lutheran Church certifying that Bertram Fair Pressler was baptized August 22, 1893, by the pastor; that his

Geraldine Pavlinak testified that she had known the decedent since 1934; that in December 1941, decedent told her and her husband that he "was all alone." That all he had was Dr. Moorhead.

Frances S. Cummings, an Arbitrator on the State Industrial Commission, testified she had known decedent since 1913; had a conversation with him in August, 1942; that he told her at that time that the only relative he knew about was a grandfather who was born in Germany and that he never knew who his grandmother was.

Margaret White testified that she lived at 5037 Warren Boulevard, Chicago; that decedent had roomed with her at that address for about 6 years; that in September 1941, Mrs. Berg and her mother, Mrs. George called on decedent in her home; that they came up to get some things he had promised them, the prayer book and towel and a table cloth; that decedent offered the witness the prayer book and she said she did not want it because she could not read German; that Mrs. Berg and her mother, Mrs. George, called at the house and asked for Mr. Weststone and she let them in. On cross examination she said that they did not sneak in at the house but that she let them in; that she was not friendly with Mrs. Berg or her mother; that they bothered her and bothered her to death "they made plenty of visits to my home." That the decedent gave the prayer book to Mrs. George and Mrs. Berg at that time.

Photostatic copies of part of the prayer book are in the record, also a certificate by the pastor of St. Paul's Evangelical Lutheran Church, certifying that Thomas H. George and Martha Presler were married August 22, 1894 and that the decedent was one of the witnesses; also a certificate by an official of the Wicker Park Lutheran Church certifying that Bertam Fair Presler was baptized August 22, 1893, by the pastor; that his

7.

parents were David Christopher Pressler and Maria Fredericka Hunstock Pressler, and the decedent was named as one of the sponsors.

Other exhibits are also found in the record, all tending to show that decedent was a relative of the heirs.

The trial judge delivered an oral opinion analyzing the evidence and said that he was unable to believe the story of Mrs. Berg who detailed the conversation she had with the deceased as to the fact that Mrs. Berg's mother, Mrs. George, and the other persons, were maternal second cousins of the deceased. He also discussed the testimony of Ruth Gagnepain who testified as to what took place when she was 12 years of age because at the time she testified it was some 20 years after the occurrence, and said her story was incredible. The court further said: "In all these years, although he lived to be close to eighty years of age and the family, if it is indeed related to him, is large, there can be found not a single letter, not a single communication between anybody other than this single conversation between the deceased and the sole witness on the table of heirship; not a single person is presented, other than the one woman, who was twelve years of age at the time of the occurrence." The court then found that the decedent left no heirs and entered a decree to the same effect.

Under the law, where the trial judge saw and heard the witnesses, he has many advantages which we do not possess in judging the weight that should be given to the evidence since we have but the printed page before us. And under the law, the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that his conclusions are wrong. Kuehne v. Malach, 286 Ill. 120; Kinnah v. Kinnah, 184 Ill. 284; Floyd v. Estate of Smith, 320 Ill. App. 171. So that the question before us is whether the finding of the trial judge is against the manifest weight of the evidence.

parents were David Christopher Pressler and Maria Frederica Hunstook Pressler, and the decedent was named as one of the sponsors.

Other exhibits are also found in the record, all tending to show that decedent was a relative of the heirs.

The trial judge delivered an oral opinion analyzing the evidence and said that he was unable to believe the story of

Mrs. Berg who detailed the conversation she had with the deceased as to the fact that Mrs. Berg's mother, Mrs. George,

and the other persons, were maternal second cousins of the deceased. He also discussed the testimony of Ruth Gagnepain who testified as to what took place when she was 12 years of age

because at the time she testified it was some 20 years after the occurrence, and said her story was incredible. The court further said: "In all these years, although he lived to be close

to eighty years of age and the family, if it is indeed related to him, is large, there can be found not a single letter, not a single communication between anybody other than this said conversation

between the deceased and the sole witness on the table of heirs; not a single person is or sent, other than the one woman who was twelve years of age at the time of the occurrence." The

court then found that the decedent left no heirs and entered a decree to the same effect.

Under the law, where the trial judge saw and heard the

witnesses, he has many advantages which we do not possess in judging the weight that should be given to the evidence since we have but the printed page before us. And under the law, the conclusions of the trial judge should not be disturbed unless it clearly appears from the record that his conclusions are wrong.

Kuehne v. Kuehne, 233 Ill. 120; Kinnah v. Kinnah, 184 Ill. 234;

Floyd v. Estate of Smith, 320 Ill. App. 171. So that the question before us is whether the finding of the trial judge is against the manifest weight of the evidence.

If the only evidence in the record as to the heirship was the testimony of Mrs. Berg as to what the deceased told her in 1939 or 1940 and Ruth Gagnepain, there would be no doubt but that the decree would have to be affirmed. But an examination of the evidence discloses the fact that Mrs. Berg testified not only that she had the conversation with the deceased at his home in the latter part of 1939 or the early part of 1940, but she further testified that she had, at other times, gone over the same question with him. Moreover Locke and Stockburger each testified that deceased told each of them that he had no relatives but some cousins. Stearnes testified that at the funeral of the wife of deceased, he introduced Stearnes to deceased's cousin, Mrs. George. The testimony of each of these witnesses we have above referred to. Moreover, the written documents in evidence tend strongly to show, in view of all the evidence in the record, that the heirs were related to the deceased. The certificate of marriage between Mrs. George and her husband, who were the parents of Mrs. Berg, was witnessed by the deceased. The church certificate recording the baptism of Bertram Fair Pressler, brother of Mrs. George (one of the heirs) showed the deceased as one of the sponsors; the prayer book, which the evidence shows deceased gave to Mrs. George when she and Mrs. Berg called on him in 1939 or 1940 shows the signature of the decedent as well as those of his grandfather, etc. And when decedent was ill, flowers were sent to him by Mrs. George and Mrs. Berg. There is other evidence in the record and we think the finding in the decree, that the deceased left no heirs surviving, is against the manifest weight of the evidence.

Before making the order of reversal we regret that we must say something more. The briefs and argument filed by counsel for the heirs contain scandalous, scurrilous and

If the only evidence in the record as to the heirship was the testimony of Mrs. Berg as to what the deceased told her in 1939 or 1940 and Ruth Gagnepain, there would be no doubt but that the decree would have to be affirmed. But an examination of the evidence discloses the fact that Mrs. Berg testified not only that she had the conversation with the deceased at his home in the latter part of 1939 or the early part of 1940, but she further testified that she had, at other times, gone over the same question with him. Moreover Locke and Stockburger each testified that deceased told each of them that he had no relatives but some cousins. Stearnes testified that at the funeral of the wife of deceased, he introduced Stearnes to deceased's cousin, Mrs. George. The testimony of each of these witnesses we have above referred to. Moreover, the written documents in evidence tend strongly to show, in view of all the evidence in the record, that the heirs were related to the deceased. The certificate of marriage between Mrs. George and her husband, who were the parents of Mrs. Berg, was witnessed by the deceased. The church certificate recording the baptism of Barram Fair Presler, brother of Mrs. George (one of the heirs) showed the deceased as one of the sponsors; the prayer book, which the evidence shows deceased gave to Mrs. George when she and Mrs. Berg called on him in 1939 or 1940 shows the signature of the deceased as well as those of his grandfather, etc. And when deceased was ill, flowers were sent to him by Mrs. George and Mrs. Berg. There is other evidence in the record and we think the finding in the decree, that the deceased left no heirs surviving, is against the manifest weight of the evidence.

Before making the order of reversal we regret that we must say something more. The briefs and argument filed by counsel for the heirs contain scandalous, malicious and

vituperative matter reflecting on many of the witnesses who testified for the estate, all of which is wholly unwarranted. The same is also true of the criticism of the trial judge. In this connection it is said that the oral opinion of the trial judge, after it was written up and approved by counsel for both parties, and sworn to be correct by the court reporter, was changed by the judge in many particulars. We have examined the opinion in the record and some corrections of language and minor matters are made in writing by the judge. We see no material change in the opinion by the corrections. In Royal Arcanum v. Green, 237 U. S. 531, the Supreme Court of the United States said: "The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in Green v. Elbert, 137 U. S. 615, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files."

In Green v. Elbert, 137 U. S. 615, referred to in the Royal Arcanum case, the court said (624): "We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free

vituperative matter reflecting on many of the witnesses who testified for the estate, all of which is wholly unwarranted. The same is also true of the criticism of the trial judge. In this connection it is said that the oral opinion of the trial judge, after it was written up and approved by counsel for both parties, and sworn to be correct by the court reporter, was changed by the judge in many particulars. We have examined the opinion in the record and some corrections of language and minor matters are made in writing by the judge. We see no material change in the opinion by the corrections. In Royal Arcanum v. Green, 237 U. S. 531, the Supreme Court of the United States said: "The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in Green v. Elbert, 137 U. S. 515, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files."

In Green v. Elbert, 137 U. S. 515, referred to in the Royal Arcanum case, the court said (524): "We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit to be submitted to the court. It is our duty to keep our records clean and free

10.

from scandal.

"The brief of the plaintiff in error will be stricken from the files." See also Reiter v. Ill. Nat. Gas. Co., 291 Ill. App. 30.

In the instant case the briefs of counsel for the heirs more flagrantly violate the law and rules of this court than did the briefs filed in the Royal Arcanum case above quoted from, and they are ordered to be stricken from the files.

The decree of the Circuit court of Cook county is reversed and the cause remanded with directions to enter a decree finding that Martha George, Ida W. Gloede, Edward Pressler, Mary Grahs, David C. Pressler and John G. Pressler are the only heirs at law and next of kin of H. C. Berthold Wetstone, deceased, being his maternal second cousins.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer and Feinberg, J. J., concur.

from scandal.

"The brief of the plaintiff in error will be stricken from the files." See also Heiter v. Ill. Nat. Gas. Co., 291

Ill. App. 30.

In the instant case the briefs of counsel for the heirs

more flagrantly violate the law and rules of this court than

did the briefs filed in the Boyer Apparatus case above quoted

from, and they are ordered to be stricken from the files.

The decree of the Circuit court of Cook county is

reversed and the cause remanded with directions to enter a

decree finding that Martha George, Ida W. Glodde, Edward

Presler, Mary Glodde, David G. Presler and John G. Presler

are the only heirs at law and next of kin of R. C. Berthold

Weststone, deceased, being his maternal second cousins.

REVERSED AND REMANDED WITH DIRECTIONS

Wiemeyer and Reinberg, J. J., concur.

43776

ESTHER A. BRYK,
Appellant,
v.
JOHN A. BRYK,
Appellee.

329 I.A. 533²

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 9, 1945, Esther A. Bryk filed her complaint against defendant for separate maintenance and afterward filed an amended and supplemental complaint for divorce charging defendant with extreme and repeated cruelty. Defendant filed his answer and counter complaint in which he denied all charges of cruelty and denied that he absented himself from plaintiff and their three children without reasonable cause; and in the counter complaint he charged that plaintiff deprived him of access to his home and that within the past five years she began a course of cruel and inhuman conduct towards him which continued until they separated in August, 1945. That at the time of the separation, without any reasonable cause, plaintiff filed a complaint in the Municipal court and he was arrested and required to furnish bond.

The case was heard by the chancellor and February 11, 1946, a decree was entered dismissing the counter claim and dismissing the amended and supplemental complaint for want of equity.

Counsel for plaintiff contends that under the evidence plaintiff was entitled to the decree of divorce on the ground of extreme and repeated cruelty and that the decree should be reversed and the cause remanded with directions to enter such a decree.

A great many points are made by counsel for plaintiff in his brief, but in the view we take of the case, we think it unnecessary to pass upon most of them for we are of opinion that the court erred in excluding evidence which counsel for plaintiff

APPEAL FROM
SUPERIOR COURT
COOK COUNTY.

ESTHER A. BRYK,
Appellant,
v.
JOHN A. BRYK,
Appellee.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT

August 9, 1945, Esther A. Bryk filed her complaint against defendant for separate maintenance and afterward filed an amended and supplemental complaint for divorce charging defendant with extreme and repeated cruelty. Defendant filed his answer and counter complaint in which he denied all charges of cruelty and denied that he spented himself from plaintiff and their three children without reasonable cause; and in the counter complaint he charged that plaintiff deprived him of access to his home and that within the past five years she began a course of cruel and inhuman conduct towards him which continued until they separated in August, 1945. That at the time of the separation without any reasonable cause, plaintiff filed a complaint in the Municipal court and he was arrested and required to furnish bond. The case was heard by the Chancellor and February 11, 1946 a decree was entered dismissing the counter claim and dismissing the amended and supplemental complaint for want of equity. Counsel for plaintiff contends that under the evidence plaintiff was entitled to the decree of divorce on the ground of extreme and repeated cruelty and that the decree should be reversed and the cause remanded with directions to enter such a decree. A great many points are made by counsel for plaintiff in his brief, but in the view we take of the case, we think it unnecessary to pass upon most of them for we are of opinion that the court erred in excluding evidence which counsel for plaintiff

2.

sought to introduce, so that there was not a fair trial.

At the opening of the hearing plaintiff was called as a witness and in reply to questions put to her by counsel, tending to elicit what occurred on August 4, 1945, the day of the separation, she proceeded to state what was said and done at that time by defendant but the court interrupted and said: "What did he do, not what he said, did he hit you at all?" Counsel for plaintiff then said: "Your Honor, I am bringing this in to show the reason for desertion. I will prove three acts of cruelty." The Court: "What is this, desertion or cruelty?" Mr. Scherman: "I am showing this thing as cruelty." The Court: "Confine yourself to one or the other." Counsel for defendant objected to this procedure and said: " It is necessary to portray to this court what kind of a man this defendant is. I want the court to understand this for a number of reasons. *** whether or not he should or should not come into this home. We have been in the police court seven times. This man is under a thousand dollar peace bond. Unless I bring or point out these things to the court you cannot possibly enter the correct orders." The court refused to go into these matters and confined the evidence to physical acts of cruelty. And later, counsel for plaintiff, in view of what evidence the court said he would admit, excused the police officer who had been summoned by plaintiff as a witness, and who was called September 3, 1945, to defendant's mother's home on account of trouble there between the parties, where defendant had been living since the separation of August 4.

The evidence offered should have been admitted. Lipe v. Lipe, 327 Ill. 39. That was a suit for divorce on the ground of extreme and repeated cruelty. The court there said (p. 43): "While mere threats and words do not amount to extreme cruelty, they are admissible in evidence to characterize the conduct of the person using them. The same act is not the same thing under all

brought to introduce, so that there was not a fair trial.

At the opening of the hearing plaintiff was called as a witness and in reply to questions put to her by counsel, tending to elicit what occurred on August 4, 1945, the day of the separation, she proceeded to state what was said and done at that time by defendant but the court interrupted and said: "That did he do, not what he said, did he hit you at all?" Counsel for plaintiff then said: "Your Honor, I am bringing this in to show the reason for desertion. I will prove three acts of cruelty." The Court: "What is this, desertion or cruelty?" Mr. Scherman: "I am showing this thing as cruelty." The Court: "Continue yourself to one or the other." Counsel for defendant objected to this procedure and said: "It is necessary to portray to this court what kind of a man this defendant is. I want the court to understand this for a number of reasons. *** whether or not he should or should not come into this home, we have been in the police court seven times. This man is under a thousand dollar peace bond. Unless I bring or point out these things to the court you cannot possibly enter the correct orders." The court refused to go into these matters and confined the evidence to physical acts of cruelty. And later, counsel for plaintiff, in view of what evidence the court said he would admit, excused the police officer who had been summoned by plaintiff as a witness, and who was called September 3, 1945, to defendant's mother's home on account of trouble there between the parties, who defendant had been living since the separation of August 4.

The evidence offered should have been admitted. Lipe v. Lipé, 327 Ill. 32. That as a suit for divorce on the ground of extreme and repeated cruelty. The court there said (p. 45): "While mere threats and words do not amount to extreme cruelty, they are admissible in evidence to characterize the conduct of the person using them. The same act is not the same thing under all

3,

circumstances and to all persons."

For the reasons stated, the decree of the Superior court of Cook county, dismissing plaintiff's amended and supplemental complaint for want of equity, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Niemeyer, J., and Feinberg, J., concur.

circumstances and to all persons.

For the reasons stated, the decree of the Superior court of Cook county, dismissing plaintiff's amended and supplemental complaint for want of equity, is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Wiemeyer, J., and Reinberg, J., concur.

43800

329 I.A. 534

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,

v.

GEORGE SPIROS,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Defendant, George Spiros, sued out a writ of error from this court seeking to reverse a judgment of the Municipal court of Chicago finding him guilty of unlawfully withholding two electric motors for his own gain and to prevent the owner, the Standard Cap & Seal Corporation, from again possessing the two motors, well knowing that they had been stolen.

August 29, 1945, a verified information was filed by John F. Rooker, in the Municipal court of Chicago, charging that defendant, George Spiros, on August 15, 1944, bought two electric motors belonging to the Standard Cap & Seal Corporation, well knowing that they were its property and had been stolen. On the same day, an order was entered giving Rooker leave to file the information reciting that defendant had been arrested and was present in open court. The hearing of the case was postponed until September 26, 1945. On that date the record discloses that defendant was arraigned, entered a plea of not guilty, waived a jury, the case was heard by the court, defendant was found guilty, sentenced to 10 days in the House of Correction and fined \$100 and costs. Defendant was not represented by counsel and the judgment recites that defendant moved to vacate the judgment and the matter was entered and continued to October 3, 1945. Thereafter the matter was postponed from time to time and November 6, 1945, counsel entered their appearance for defendant and three days following,

PEOPLE OF THE STATE OF ILLINOIS
Defendant in Error,

v.

GEORGE SPIROS,
Plaintiff in Error.

COURT OF CHICAGO.
ERROR TO MUNICIPAL

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Defendant, George Spiros, sued out a writ of error from

this court seeking to reverse a judgment of the Municipal court

of Chicago finding him guilty of unlawfully withholding two

electric motors for his own gain and to prevent the owner, the

Standard Gap & Seal Corporation, from again possessing the two

motors, well knowing that they had been stolen.

August 29, 1945, a verified information was filed by

John F. Rooker, in the Municipal court of Chicago, charging

that defendant, George Spiros, on August 15, 1944, bought two

electric motors belonging to the Standard Gap & Seal Corpor-

ation, well knowing that they were its property and had been

stolen. On the same day, an order was entered giving Rooker

leave to file the information reciting that defendant had been

arrested and was present in open court. The hearing of the case

was postponed until September 26, 1945. On that date the record

discloses that defendant was arraigned, entered a plea of not

guilty, waived a jury, the case was heard by the court, defend-

ant was found guilty, sentenced to 10 days in the House of

Correction and fined \$100 and costs. Defendant was not

represented by counsel and the judgment recites that defendant

moved to vacate the judgment and the matter was entered and

continued to October 3, 1945. Thereafter the matter was

postponed from time to time and November 6, 1945, counsel

entered their appearance for defendant and three days following,

3231A-234

moved the court to sustain defendant's motion to vacate the judgment and in support of this, filed the affidavit of defendant, and November 16 filed a motion for a new trial. The matter was again postponed, and November 30 defendant's motions to vacate the judgment and for a new trial were overruled and the mittimus stayed so as to permit defendant to bring the case to this court. February 27, 1946, a report of the proceedings was filed which contains all the evidence heard on September 26, 1945, at which time defendant was found guilty and the judgment followed as above stated.

Defendant was engaged in the restaurant business making sandwiches and selling them to the Government and the Navy during the war, at three different places of business located on Montana St. and Wilson Ave. and Broadway. The sandwiches were made at his place on Montana street where he had been in business for several years. There was a tavern located next door where he often visited and was acquainted with the tavern keeper.

Defendant testified that one of his girls was having a birthday and he told the girls to go into the tavern and have a few drinks on him. Later he went into the tavern and was in conversation with the owner of the tavern who was talking with John Kostick and shortly thereafter the tavern keeper asked defendant if he needed any motors. Defendant replied that he did not. The tavern keeper then said that Kostick had two motors for sale which he said he had bought some years ago from the Master Electrical Company where he used to work; that the tavern keeper said that Kostick was hard up and had a bad foot and shortly thereafter Kostick talked to defendant and defendant bought the two motors for \$42.50, and that Kostick gave him a bill of sale for them which defendant had misplaced or lost when they were cleaning up the restaurant. That he bought the motors in good faith and did not know they had been stolen. On cross-

moved the court to sustain defendant's motion to vacate the judgment and in support of this, filed the affidavit of defend-

ant, and November 16 filed a motion for a new trial. The matter was again postponed, and November 30 defendant's motions

to vacate the judgment and for a new trial were overruled and the mittimus stayed so as to permit defendant to bring the case

to this court. February 27, 1946, a report of the proceedings was filed which contains all the evidence heard on September

26, 1945, at which time defendant was found guilty and the judgment followed as above stated.

Defendant was engaged in the restaurant business making

sandwiches and selling them to the Government and the Navy during the war, at three different places of business located on Montana

St. and Wilson Ave. and Broadway. The sandwiches were made at his place on Montana street where he had been in business for

several years. There was a tavern located next door where he often visited and was acquainted with the tavern keeper.

Defendant testified that one of his girls was having a birthday and he told the girls to go into the tavern and have a

few drinks on him. Later he went into the tavern and was in conversation with the owner of the tavern who was talking with

John Kostick and shortly thereafter the tavern keeper asked defendant if he needed any motors. Defendant replied that he

did not. The tavern keeper then said that Kostick had two

motors for sale which he said he had bought some years ago from the Master Electrical Company where he used to work; that the

tavern keeper said that Kostick was hard up and had a bad foot and shortly thereafter Kostick talked to defendant and defendant

bought the two motors for \$42.50, and that Kostick gave him a bill of sale for them which defendant had misplaced or lost when they

were cleaning up the restaurant. That he bought the motors in good faith and did not know they had been stolen. On cross-

examination by the Assistant State's Attorney defendant testified that he bought the motors last year [1944]; that he had no use for them outside of possibly using them in his ice boxes but he never tried to use them; that the motors were left in his window in the restaurant, and later when they were cleaning the restaurant they were taken by Joseph Marchi, who was employed by defendant in delivering sandwiches and who also ran a radio shop some distance from the restaurant during some afternoons and evenings when he was not delivering sandwiches. Defendant was then further cross-examined by counsel for the Standard Cap & Seal Corporation, the owner of the motors. Defendant then testified that Kostick asked \$45 for the motors but that defendant paid him \$42.50.

The evidence is further that the motors belonged to the Standard Cap & Seal Corporation which had a place of business across the street from the restaurant and that John Kostick, who was there employed, stole them and sold them to defendant, as above stated.

Marchi testified that he worked for defendant delivering sandwiches for about four years except one year when he was in the Army; that he had a radio shop where he worked in the evening from about 4 to 10 o'clock; that he took the motors from the restaurant to the radio shop because they were cleaning the restaurant, and put one of them in the window at his shop; that both in the restaurant and in the radio shop the motors were in open view of anyone.

There is other evidence in the record but we think it unnecessary to mention it here, for upon a consideration of all the evidence in the record we are clearly of the opinion that it fails to show, beyond a reasonable doubt, that defendant knew the motors were stolen when he purchased them. On the contrary we think the evidence shows that defendant paid for the motors

examination by the Assistant State's Attorney defendant testified that he bought the motors last year [1944]; that he had no use for them outside of possibly using them in his ice boxes but he never tried to use them; that the motors were left in his window in the restaurant, and later when they were cleaning the restaurant they were taken by Joseph Marchi, who was employed by defendant in delivering sandwiches and who also ran a radio shop some distance from the restaurant during some afternoons and evenings when he was not delivering sandwiches. Defendant was then further cross-examined by counsel for the Standard Cap & Seal Corporation, the owner of the motors. Defendant then testified that Kostick asked \$45 for the motors but that defendant paid him \$42.50.

The evidence is further that the motors belonged to the Standard Cap & Seal Corporation which had a place of business across the street from the restaurant and that John Kostick, who was there employed, stole them and sold them to defendant, as above stated.

Marchi testified that he worked for defendant delivering sandwiches for about four years except one year when he was in the Army; that he had a radio shop where he worked in the evening from about 4 to 10 o'clock; that he took the motors from the restaurant to the radio shop because they were cleaning the restaurant, and put one of them in the window at his shop; that both in the restaurant and in the radio shop the motors were in open view of anyone.

There is other evidence in the record but we think it unnecessary to mention it here, for upon a consideration of all the evidence in the record we are clearly of the opinion that it fails to show, beyond a reasonable doubt, that defendant knew the motors were stolen when he purchased them. On the contrary we think the evidence shows that defendant paid for the motors

what they were reasonably worth and that he bought them, not on the ground that he expected to use them, but more to help out Kostick, who, the tavern keeper said, was hard up and suffering with a bad foot. Moreover, defendant made no attempt to conceal the motors; they were placed in the restaurant and months afterward, taken over to the radio shop where they could be seen by anyone and where they were finally seen by the representative of the Standard Cap & Seal Corporation.

The judgment of the Municipal court of Chicago is reversed.

JUDGMENT REVERSED.

Niemeyer and Feinberg, JJ., concur.

The judgment of the Municipal court of Chicago is

representative of the Standard Gap & Seal Corporation.

be seen by anyone and where they were finally seen by the

months afterward, taken over to the radio shop where they could

to conceal the motors; they were placed in the restaurant and

suffering with a bad foot. Moreover, defendant made no attempt

out Kostick, who, the tavern keeper said, was hard up and

on the ground that he expected to use them, but more to help

what they were reasonably worth and that he bought them, not

reversed.

JUDGMENT REVERSED.

Wiemeyer and Reinberg, JJ., concur.

17A

）

V.

) PETITION FOR LEAVE TO APPEAL FROM
) AN ORDER OF THE SUPERIOR COURT
) OF COOK COUNTY, GRANTING A NEW TRIAL.

329 I.A. 535

Leon Sex filed a petition in this court for leave to appeal from an order of the Superior court of Cook county granting Jack Rago, plaintiff, a new trial. We allowed the petition for leave to appeal and the case is now before us on the record, abstract and brief filed by the petitioner, Sex.

The record discloses that November 27, 1944, Jack Rago brought an action against Leon S. Sex, Clarice Sex, his wife, Larry Knight and Marjorie Knight, his wife, to recover damages for personal injuries claimed to have been sustained by him through the negligence of defendants in allowing a trap door in the floor of the restaurant operated by Knight and his wife to remain open and unguarded, as a result of which one of his feet slipped into the opening and he was injured. Leon S. Sex filed his answer denying liability, Knight failed to appear and he was defaulted. Afterward the suit was dismissed as to Mrs. Sex and Mrs. Knight. The case was tried before a judge and jury; there was a verdict finding defendant, Leon S. Sex, not guilty and a directed verdict finding the defendant, Larry Knight, guilty and assessing plaintiff's damages at \$500. Judgment was entered on the verdicts. Afterward Leon S. Sex filed a motion for a new trial, which was allowed, the judgments entered on the two verdicts were set aside and a new trial awarded. No brief has been filed by plaintiff, Jack Rago.

JACK RAGO, Respondent,
v.
LEON S. SEX, Petitioner.

PEITION FOR LEAVE TO APPEAL FROM
AN ORDER OF THE SUPERIOR COURT
OF COOK COUNTY, GRANTING A NEW TRIAL

8291 A. 335

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Leon Sex filed a petition in this court for leave to appeal from an order of the Superior Court of Cook County granting Jack Rago, plaintiff, a new trial. We allowed the petition for leave to appeal and the case is now before us on the record, abstract and brief filed by the petitioner, Sex. The record discloses that November 27, 1944, Jack Rago brought an action against Leon S. Sex, Clarence Sex, his wife, Larry Knight and Marjorie Knight, his wife, to recover damages for personal injuries claimed to have been sustained by him through the negligence of defendants in allowing a trap door in the floor of the restaurant operated by Knight and his wife to remain open and unguarded, as a result of which one of his feet slipped into the opening and he was injured. Leon S. Sex filed his answer denying liability. Knight failed to appear and he was defaulted. Afterward the suit was dismissed as to Mrs. Sex and Mrs. Knight. The case was tried before a Judge and Jury; there was a verdict finding defendant, Leon S. Sex, not guilty and a directed verdict finding the defendant, Larry Knight, guilty and assessing plaintiff's damages at \$500. Judgment was entered on the verdicts. Afterward Leon S. Sex filed a motion for a new trial, which was allowed, the judgments entered on the two verdicts were set aside and a new trial awarded. No brief has been filed by plaintiff, Jack Rago.

The record discloses that April 12, 1943, Leon S. Sex & Co., as lessor, leased the property to Larry Knight and Marjorie Knight, his wife, to be occupied by them as a restaurant and tavern for a period beginning May 1, 1943 and expiring April 30, 1944. The Knights were conducting a restaurant in the premises and about 10 o'clock on the morning of July 14, 1943, plaintiff, Jack Rago, who with others was in the undertaking business, entered into the restaurant for something to eat. While there he started to go to the toilet when he stepped with one of his feet into the open space where the trap door was left open by one of Knight's employees, so that Rago was injured.

The lease was in the usual form and possession of the premises was thereby conveyed to the tenant, Knight. The court granted a new trial on the ground, as he said, that while each of the instructions given was correct, the cumulative effect of certain of them was prejudicial to plaintiff.

There was evidence to the effect that Rago was not in good health for some time prior to the date he was injured, having gone to the Mayo Clinic in Rochester, Minnesota, on account of a hernia from which he had been suffering. The undisputed evidence is that Sex had nothing to do with the building after renting it to the Knights and that the only negligence, if any, was that of the Knights, through their employee, who left the trap door open.

Counsel for defendant Sex contend that in the light of all the evidence, no cause of action was proven against Sex and that the court should have directed a verdict as requested, at the close of all the evidence. In support of this counsel say that under the terms of the lease, the lessee was required to keep the premises clean and in good condition and make all repairs that might be necessary.

The record discloses that April 12, 1943, Leon S. Sex & Co., as lessor, leased the property to Larry Knight and Marjorie Knight, his wife, to be occupied by them as a restaurant and tavern for a period beginning May 1, 1943 and expiring April 30, 1944. The Knights were conducting a restaurant in the premises and about 10 o'clock on the morning of July 14, 1943, plaintiff, Jack Rago, who with others was in the undertaking business, entered into the restaurant for something to eat. While there he started to go to the toilet when he stepped with one of his feet into the open space where the trap door was left open by one of Knight's employees, so that Rago was injured.

The lease was in the usual form and possession of the premises was thereby conveyed to the tenant, Knight. The court granted a new trial on the ground, as he said, that while each of the instructions given was correct, the cumulative effect of certain of them was prejudicial to plaintiff.

There was evidence to the effect that Rago was not in good health for some time prior to the date he was injured, having gone to the Mayo Clinic in Rochester, Minnesota, on account of a hernia from which he had been suffering. The undisputed evidence is that Sex had nothing to do with the building after renting it to the Knights and that the only negligence, if any, was that of the Knights, through their employee, who left the trap door open.

Counsel for defendant Sex contend that in the light of all the evidence, no cause of action was proven against Sex and that the court should have directed a verdict as requested at the close of all the evidence. In support of this counsel say that under the terms of the lease, the lease was required to keep the premises clean and in good condition and make all repairs that might be necessary.

In the complaint and on the trial, counsel for plaintiff referred to certain provisions of Ordinances of the City of Chicago, which they contended show there was a duty on the landlord to protect persons from falling into the trap door which was left open. We have examined some of these sections (but have had no assistance because plaintiff filed no brief in this court) and find nothing in them that would make Sex, the landlord, liable to plaintiff, under the facts of the case.

Since the premises were in the exclusive control of the tenant, Knight, we think there was no liability on the part of the landlord for the injuries plaintiff claims to have suffered. Seibel v. Oconto Co., 299 Ill. App. 518. In that case we held that where premises are leased and the lessee takes possession, in the absence of concealment or fraud by the landlord as to some defect known to him but unknown to the tenant, the tenant assumes the risk of personal injury from defects even though the owner covenants to repair. Borggard v. Gale, 205 Ill. 511. See also West Chicago Masonic Assn. v. Cohn, 192 Ill. 210; Staples v. Sanders, 164 Ore. 244; Campbell v. Weathers, 153 Kans. 316; Lyman v. Hermann, 203 Minn. 225.

The court erred in allowing plaintiff a new trial, and for that reason, the order and judgment of the Superior court of Cook county awarding a new trial and setting aside the judgment against defendant, Knight, is reversed, and since we hold that defendant, Sex, was in no way liable, the matter will be remanded with directions to enter judgment on the verdict in favor of Sex.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer and Feinberg, J. J., concur.

In the complaint and on the trial, counsel for plaintiff referred to certain provisions of Ordinances of the City of Chicago, which they contended show there was a duty on the landlord to protect persons from falling into the trap door which was left open. We have examined some of these sections (but have had no assistance because plaintiff filed no brief in this court) and find nothing in them that would make Sex, the landlord, liable to plaintiff, under the facts of the case.

Since the premises were in the exclusive control of the tenant, Knight, we think there was no liability on the part of the landlord for the injuries plaintiff claims to have suffered. Goebel v. Goette Co., 200 Ill. App. 518. In that case we held that where premises are leased and the lessee takes possession, in the absence of concealment or fraud by the landlord as to some defect known to him but unknown to the tenant, the tenant assumes the risk of personal injury from defects even though the owner covenants to repair. Borwick v. Gale, 208 Ill. 511. See also West Chicago Masonic Assn. v. Gohn, 192 Ill. 810; Stables v. Gander, 184 Ore. 344; Campanelli v. Westlake, 183 Kans. 316; Lyman, Herman, 203 Minn. 285.

The court erred in allowing plaintiff a new trial, and for that reason, the order and judgment of the Superior court of Cook county awarding a new trial and setting aside the judgment against defendant, Knight, is reversed, and since we hold that defendant, Sex, was in no way liable, the matter will be remanded with directions to enter judgment on the verdict in favor of Sex.

REVERSED AND REMANDED WITH DIRECTIONS.

Niemeyer and Teinberg, J. J., concur.

43748

ALICE FROST,
Appellee,

v.

ANDES CANDIES, INC., et al.,
Appellants.

18 A
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

329 I.A. 535²

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants for personal injuries. A jury trial resulted in a verdict for \$15,000.00 against the defendants, upon which judgment was entered and from which defendants appeal.

For convenience, defendant Andes Candies, Inc. will be referred to as Andes and defendant Elton A. Gould, individually and doing business as Gould Electric Company, will be referred to as Gould.

Andes owned and operated a candy store at 3204 Lincoln Avenue, Chicago. Gould was in the electrical supply business and in November 1941 installed in this store, lighting fixtures with fluorescent tubes.

On the day of the accident, Gould was hired by Andes to repair some fluorescent lights in the window and in the store proper. The lighting fixture in question extended from the front to the rear end of the store and was fastened to the ceiling. The fixture had fluorescent tubes enclosed by frosted glass, semi-circular in shape and divided into sections, each 24 inches long. The weight of each section of glass does not appear in evidence. These sections rested on semi-circular bands and into a slot and were removable by lifting the end of the section out of the slot and tilting it. Gould's employee, Hartwig, placed a ladder underneath the front end of this fixture, near the door entrance, ascended it and removed one of the sections

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

ALICE FROST,
Appellee,
v.
ANDES CANDIES, INC., et al.,
Appellants.

MR. JUSTICE EMMERT DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant for personal injuries. A jury trial resulted in a verdict for \$15,000.00 against the defendant, upon which judgment was entered and from which defendant appeal.

For convenience, defendant Andes Candies, Inc. will be referred to as Andes and defendant Elton A. Gould, individually and doing business as Gould Electric Company, will be referred to as Gould.

Andes owned and operated a candy store at 3034 Lincoln Avenue, Chicago. Gould was in the electrical supply business and in November 1941 installed in this store, lighting fixtures with fluorescent tubes.

On the day of the accident, Gould was hired by Andes

to repair some fluorescent lights in the window and in the

store proper. The lighting fixture in question extended from the

front to the rear end of the store and was fastened to the

ceiling. The fixture had fluorescent tubes enclosed by frosted

glass, semi-circular in shape and divided into sections, each

24 inches long. The weight of each section of glass does not

appear in evidence. These sections rested on semi-circular bands

and into a slot and were removable by lifting the end of the

section out of the slot and tilting it. Gould's employee, Harry,

placed a ladder underneath the front end of this fixture, near

the door entrance, ascended it and removed one of the sections

2.

of glass next to the one involved in the accident enclosing two burned out fluorescent tubes. He also removed the two burned out tubes and descended to the floor with the intention of installing two workable tubes. While on the floor preparing for the replacement, plaintiff walked into the store to buy some ice cream cones. The lady in charge of the store waited on plaintiff, and while plaintiff was standing directly under the fixture in question, waiting for her purchase, a section of the semi-circular glass, next to the one which was removed, fell from the fixture and hit plaintiff on the head, resulting in the injuries complained of. No warning was given plaintiff by the lady in charge of the store or by Gould's employee of the character of the repair work going on, or of any danger in her standing position under the fixture. It is undisputed that when Gould's employee arrived to do the repair work on the fixture in question the lady in charge of the store pointed out to him a crack in the glass involved in the accident. It appears that this crack in the section of glass which fell was an old one, evidenced by the dirt and dust that had accumulated in the crack and portion immediately surrounding it.

Gould's employee and plaintiff were the only witnesses to the occurrence who testified. The employee of Andes, who waited on plaintiff, did not testify, and by stipulation of the parties her failure to testify was accounted for by her absence out of the state. No explanation appears in the record as to why her deposition had not been taken.

After being struck by the glass, plaintiff was dazed. There was a deep gash on the top of her head and to the rear, and the blood was running down her dress from the gash. Her

of glass next to the one involved in the accident enclosed in two
burned out fluorescent tubes. He also removed the two burned
out tubes and descended to the floor with the intention of
installing two workable tubes. While on the floor preparing for
the replacement, Plaintiff walked into the store to buy some
ice cream cones. The lady in charge of the store waited on
Plaintiff, and while Plaintiff was standing directly under the
fixture in question, waiting for her purchase, a section of the
semi-circular glass, next to the one which was removed, fell from
the fixture and hit Plaintiff on the head, resulting in the
injuries complained of. No warning was given Plaintiff by the
lady in charge of the store or by Gould's employee of the
character of the repair work going on, or of any danger in her
standing position under the fixture. It is undisputed that
when Gould's employee arrived to do the repair work on the fixture
in question the lady in charge of the store pointed out to him
a crack in the glass involved in the accident. It appears that
this crack in the section of glass which fell was an old one,
evidenced by the dirt and dust that had accumulated in the
crack and portion immediately surrounding it.

Gould's employee and Plaintiff were the only witnesses
to the occurrence who testified. The employee of Anders, who
waited on Plaintiff, did not testify, and by stipulation of the
parties her failure to testify was accounted for by her absence
out of the state. No explanation appears in the record as to
why her deposition had not been taken.

After being struck by the glass, Plaintiff was dazed.
There was a deep gash on the top of her head and to the rear,
and the blood was running down her dress from the gash. Her

3.

left ankle was cut and was closed with four stitches made by the attending physician, who also dressed the scalp wound. The medical testimony is undisputed that she sustained a skull fracture. At the time of the accident, August 23, 1944, plaintiff was 22 years old, married, and had been working as an elevator operator in a clothing store in the immediate vicinity of Andes, earning \$27.50 per week. Her husband was in the military service. She was taken to the hospital on August 24, 1944, and remained there until August 29th. At the hospital she was put to bed and ice packs were placed on her head. She testified she had frequent dizzy spells, pain and buzzing sounds in the ears, vomiting spells, and had lost ten pounds in weight between the day of the accident and the trial of the case; that at the time of the trial, November 6, 1945, she still had dizzy spells, which would come on all of a sudden, things would get hazy and she had to hang on to something to keep from falling; that such spells would last a couple of minutes and would happen as often as three times a week; that she never had any of the conditions complained of prior to the accident; that she had to quit her employment and had not been able to work since the accident. The undisputed medical testimony on behalf of plaintiff was that the injury to the brain and conditions complained of were of a permanent character.

The defense of Andes was that it was not liable to the plaintiff because it had employed Gould as an independent contractor to do the repair work in question; that Andes did not direct or control the manner in which the work was done; that the accident resulting to plaintiff, if due to any negligence, was that of Gould and not Andes; and that it could not be held responsible for the acts of the independent contractor. In connection with this contention, Andes also argues that the nature of the repair work done by Gould was not inherently dangerous so as to make the employer of an independent contractor liable

The undersigned medical testimony on behalf of plaintiff was that the injury to the brain and condition complained of were of a permanent character.

The defense of Andes was that it was not liable to the plaintiff because it had employed Gould as an independent contractor to do the repair work in question; that Andes did not direct or control the manner in which the work was done; that the accident resulting to plaintiff, if due to any negligence, was that of Gould and not Andes; and that it could not be held responsible for the acts of the independent contractor. In connection with this contention, Andes also argues that the nature of the repair work done by Gould was not inherently dangerous so as to make the employer of an independent contractor liable

4.

with the independent contractor.

The defense of Gould was that it was not guilty of negligence in the performance of the repair work.

The complaint in this case charged that the repairs were by their very nature intrinsically and inherently dangerous. It was the theory of plaintiff that Andes owed a duty to plaintiff, who was an invitee, to furnish a reasonably safe place for her while making the purchase, and that if the charge in the complaint be true, Andes should have warned plaintiff of the danger of the repair work in progress or should have roped off the space where the work was being done, so as to prevent plaintiff from occupying a place of danger. Negligence was charged against Gould in the performance of the work.

Andes offered no evidence in defense upon the trial. Gould's employee was the only defense witness to the occurrence, who in no essential respect disputed the evidence of plaintiff as to the occurrence. At the close of all the evidence both defendants moved for a directed verdict, which was overruled, and after the verdict filed motions for judgment non obstante veredicto and for a new trial, each of which motions was overruled.

Defendant Andes cannot escape liability in this case on the theory of independent contractor. The general doctrine upon which Andes relies is that one who employs an independent contractor to perform work in and about a building, and who does not control or direct the work of the independent contractor, may not be held liable for the negligence of the independent contractor. Geist v. Rothschild, 90 Ill. App. 324, is chiefly relied upon by Andes. There is an exception to this general rule of independent contractor, as pointed out in Andronick v. Daniszewski, 268 Ill. App. 543, and that ^{is} where one is invited into the premises of another, where repair work is being performed, and the work in its very nature is dangerous, it is incumbent upon the owner of

with the independent contractor.

The defense of Gould was that it was not guilty of

negligence in the performance of the repair work.

The complaint in this case charged that the repairs were by their very nature intrinsically and inherently dangerous. It was the theory of plaintiff that Andes owed a duty to plaintiff, who was an invitee, to furnish a reasonably safe place for her while making the purchase, and that if the charge in the complaint be true, Andes should have warned plaintiff of the danger of the repair work in progress or should have roped off the space where the work was being done, so as to prevent plaintiff from occupying a place of danger. Negligence was charged against Gould in the performance of the work.

Andes offered no evidence in defense upon the trial. Gould's employee was the only defense witness to the occurrence, who in no essential respect disputed the evidence of plaintiff as to the occurrence. At the close of all the evidence both defendants moved for a directed verdict, which was overruled, and after the verdict filed motions for judgment non obstante verdicto and for a new trial, each of which motions was overruled.

Defendant Andes cannot escape liability in this case on the theory of independent contractor. The general doctrine upon which Andes relies is that one who employs an independent contractor to perform work in and about a building, and who does not control or direct the work of the independent contractor, may not be held liable for the negligence of the independent contractor. Geist v. Ottschling, 90 Ill. App. 324, is chiefly relied upon by Andes. There is an exception to this general rule of independent contractor, as pointed out in Angonick v. Deitzewald, 288 Ill. App. 543, and that there one is invited into the premises of another, where repair work is being performed, and the work in its very nature is dangerous, it is incumbent upon the owner of

5,

the premises to provide a safe place for the invitee and in some form warn him of the danger. Several cases are reviewed in that case, supporting this exception.

In the instant case, the section of glass, which fell upon plaintiff, appeared to have an old crack in it. It was pointed out to Gould's employee by the lady in charge of the store. Both Andes and Gould knew of this crack in the section of glass. When Gould's employee removed the section of glass next to the one in question and removed the fluorescent tubes inside the fixture, the fair inference from the evidence, which the jury had a right to consider, was that the jarring of the fixture in the removal of the section of glass and fluorescent tubes could well have resulted in the falling of the broken glass. It did not fall before the work started. It tended to prove Gould was guilty of negligence in not removing the broken glass during the repair work, and causing the glass to fall, and negligence on the part of Andes in not warning the plaintiff of the place of danger in which she was standing. Allowing a cracked section of glass to remain in the fixture upon which the work was being done, in a candy store where customers were likely to enter and occupy a place of danger, creates a dangerous condition, which both Andes and Gould should have reasonably anticipated, and makes this class of work inherently dangerous within the rule laid down in Andronick v. Daniszewski.

Complaint is made by Gould as to the giving of instruction No. 16 and the refusal to give another instruction, unnumbered. Instruction No. 16 reads:

"16. You are instructed that if you believe from the evidence and under the instructions of the court that the sole cause of the injury to the plaintiff was the result of the handling and making of certain repairs by the employee of Elton A. Gould, if you believe from the evidence that the accident and injury was the result of the actions and repairing operations as conducted by the employee of Elton A. Gould, then it is the duty of the jury to find the defendant, Andes Candies, Inc. not guilty."

Gandies, Inc. not guilty."

duty of the jury to find the defendant, Andes by the employee of Elton A. Gould, then it is the the actions and repairing operations as conducted that the accident and injury was the result of Elton A. Gould, if you believe from the evidence and making of certain repairs by the employee of the plaintiff was the result of the handling of the court that the sole cause of the injury from the evidence and under the instructions "16. You are instructed that if you believe within the rule laid down in Androski v. Dolezowski, anticipated, and make this class of work inherently dangerous condition, which both Andes and Gould should have reasonably to enter and occupy a place of danger, creates a dangerous was being done, in a candy store where customers were likely section of glass to remain in the fixture upon which the work place of danger in which she was standing. Allowing a cracked ligence on the part of Andes in not warning the plaintiff of the during the repair work, and causing the glass to fall, and neg- Gould was guilty of negligence in not removing the broken glass It did not fall before the work started. It tended to prove tubes could well have resulted in the falling of the broken glass the fixture in the removal of the section of glass and fluorescent which the jury had a right to consider, was that the falling of inside the fixture, the fair inference from the evidence, next to the one in question and removed the fluorescent tubes of glass. When Gould's employee removed the section of glass store. Both Andes and Gould knew of this crack in the section pointed out to Gould's employee by the lady in charge of the upon plaintiff, appeared to have an old crack in it. It was In the instant case, the section of glass, which fell in that case, supporting this exception.

some form warn him of the danger. Several cases are reviewed the premises to provide a safe place for the invitee and in

Complaint is made by Gould as to the giving of instruction No. 16 and the refusal to give another instruction, unnecessary.

Instruction No. 16 reads:

It was an instruction given on behalf of Andes, who was entitled to have its theory of the case submitted to the jury in such an instruction. If the sole cause of the injury was the repair work by Gould, and the jury so found, Andes could not be held liable. This was held to be the correct principle of law in Chicago Union Traction Co. v. Leach, 215 Ill. 186, and Chicago City Ry. Co. v. O'Donnell, 208 Ill. 267.

The refused instruction, tendered by Gould, reads:

"If the jury believe from the evidence that as between the plaintiff and the defendant, Elton A. Gould, the alleged injury was accidental and that neither the plaintiff nor the defendant, Elton A. Gould, were negligent, the jury should find the defendant, Elton A. Gould, not guilty."

Where there is evidence of negligence, and it clearly appears that the injury occurred not through accident alone, such an instruction is properly refused. Streeter v. Humrichouse, 357 Ill. 234; Kovacs v. Richardson, 306 Ill. App. 194.

In Kovacs v. Richardson, it was said by this Court:

"Under the facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose. In the case of Streeter v. Humrichouse, 357 Ill. 234, Mr. Justice Farthing hit the nail on the head when he held that an instruction like the one in question should not be given in a case unless there was evidence that a plaintiff was injured through accident, alone. In the instant case, if the accident to plaintiff occurred through the negligence of defendants, or through the negligence of plaintiff, or through the negligence of plaintiff and defendants, the injuries to plaintiff would not be caused by 'a mere accident.'"

In the Streeter case, it was said:

"There was no evidence that McGann was injured through accident, alone, not coupled with negligence, and it was error to give this instruction."

The trial court, in the instructions given, fairly presented the theories of the defendants as well as the plain-

It was an instruction given on behalf of Andes, who was entitled to have its theory of the case submitted to the jury in such an instruction. If the sole cause of the injury was the repair work by Gould, and the jury so found, Andes could not be held liable. This was held to be the correct principle of law in Chicago Union Traction Co. v. Leason, 215 Ill. 186, and Chicago City Ry. Co. v. O'Donnell, 208 Ill. 264.

The refused instruction, tendered by Gould, reads:

"If the jury believe from the evidence that as between the plaintiff and the defendant, Elton A. Gould, the alleged injury was accidental and that neither the plaintiff nor the defendant, Elton A. Gould, were negligent, the jury should find the defendant, Elton A. Gould, not guilty."

Where there is evidence of negligence, and it clearly appears that the injury occurred not through accident alone, such an instruction is properly refused. Streeter v. Humphreus, 357 Ill. 234; Kovacs v. Richardson, 308 Ill. App. 194.

In Kovacs v. Richardson, it was said by this Court:

"Under the facts of the instant case this instruction could only confuse and mislead the jury. That was its plain purpose. In the case of Streeter v. Humphreus, 357 Ill. 234, Mr. Justice Farthing hit the nail on the head when he held that an instruction like the one in question should not be given in a case unless there was evidence that a plaintiff was injured through accident alone. In the instant case, if the accident to plaintiff occurred through the negligence of defendant, or through the negligence of plaintiff, or through the negligence of plaintiff and defendant, the injuries to plaintiff would not be caused by 'a mere accident.'"

In the Streeter case, it was said:

"There was no evidence that McGinn was injured through accident alone, not coupled with negligence, and it was error to give this instruction."

The trial court, in the instructions given, fairly presented the theories of the defendants as well as the plain-

7.

tiff.

It is urged by both defendants that the verdict was excessive and for that reason a new trial should have been granted. Upon the hearing of the motion for a new trial, when the court asked for suggestions upon the question of the excessiveness of the verdict, the record discloses that counsel for Gould indicated that in his opinion a verdict for \$10,000.00 would have been ample for the injuries claimed, which would be \$5,000.00 less than the amount of the verdict. This court has had many occasions to pass upon the question of excessiveness of verdicts. The latest expression upon the subject by this court may be found in Howard v. B. & O. C. T. R. Co., 327 Ill. App. 83, which involved a verdict of \$50,000.00. It was there said:

"We have often recognized, in passing upon the amount of damages awarded, the decline in the purchasing power of money." (Citing cases.)

A similar injury and verdict and complaint as to excessiveness, as in the instant case, were involved in Kiewert v. Balaban & Katz Corp., 251 Ill. App. 342. This court in that case sustained the verdict. Considering the character of the injuries, and the loss of earnings sustained by plaintiff, we cannot say that the verdict in this case was excessive.

We find no error in the record which would justify a reversal of the judgment. It is accordingly affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

1111.

It is urged by both defendants that the verdict was excessive and for that reason a new trial should have been granted. Upon the hearing of the motion for a new trial, when the court asked for suggestions upon the question of the excessiveness of the verdict, the record discloses that counsel for Gould indicated that in his opinion a verdict for \$10,000.00 would have been ample for the injuries claimed, which would be \$5,000.00 less than the amount of the verdict. This court has had many occasions to pass upon the question of excessiveness of verdicts. The latest expression upon the subject by this court may be found in Howard v. B. & O. G. T. R. Co., 327 Ill. App. 83, which involved a verdict of \$5,000.00. It was there

said:

"We have often recognized, in passing upon the amount of damages awarded, the decline in the purchasing power of money." (Citing cases.)

A similar injury and verdict and complaint as to excessiveness, as in the instant case, were involved in Life Savers v. Balaban & Katz Corp., 351 Ill. App. 342. This court in that case sustained the verdict. Considering the character of the injuries and the loss of earnings sustained by plaintiff, we cannot say that the verdict in this case was excessive. We find no error in the record which would justify a reversal of the judgment. It is accordingly affirmed.

AFFIRMED.

O'Connor, P. J., and Lemeyer, J., concur.

43809

ANNA M. SNOWELL,
Appellant,

v.

ADELLA E. KNIGHT,
Appellee.

19 A
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

329 I.A. 536

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant in the Circuit Court of Cook County, to recover upon a promissory note for \$3730, dated September 25, 1940, signed by defendant. A trial without a jury resulted in a judgment for defendant, from which plaintiff appeals.

The essential facts are undisputed. Plaintiff was an intimate friend over a period of years of Marguerite Wazau, now deceased. She had a number of financial transactions with her involving loans to the decedent, for which the decedent gave plaintiff notes. One of these loans was originally for \$7500, for which the decedent gave plaintiff her note, dated 1930, and for another loan of \$11,400, decedent gave plaintiff her note, dated 1932. It is admitted that the note for \$11,400 had been paid and discharged by the transfer of an interest to plaintiff in a cooperative apartment located at 606 Michigan Avenue, Evanston. With respect to the \$7500 transaction, plaintiff borrowed that amount on her annuity from an insurance company, and the insurance company paid over the proceeds of the loan directly to the decedent. This loan was later repaid to the insurance company - admittedly, not by plaintiff. The fair inference and the legal presumption arises upon the record that the decedent paid it. Decedent died in June, 1939, and defendant took complete charge of her estate and property and took care of

43809

ANNA M. SNOWELL,
Appellant,

v.

ADELLA E. KNIGHT,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

3291 A. 586

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant in the

Circuit Court of Cook County, to recover upon a promissory note for \$2750, dated September 25, 1940, signed by defendant. A trial without a jury resulted in a judgment for defendant, from which plaintiff appeals.

The essential facts are undisputed. Plaintiff was an

intimate friend over a period of years of Marguerite Warren, now deceased. She had a number of financial transactions with her involving loans to the decedent, for which the decedent gave plaintiff notes. One of these loans was originally for \$2500, for which the decedent gave plaintiff her note, dated 1930, and for another loan of \$11,400, decedent gave plaintiff her note, dated 1932. It is admitted that the note for \$11,400 had been paid and discharged by the transfer of an interest to plaintiff in a cooperative apartment located at 806 Michigan Avenue, Evanston. With respect to the \$2500 transaction, plaintiff borrowed that amount on her annuity from an insurance company, and the insurance company paid over the proceeds of the loan directly to the decedent. This loan was later repaid to the insurance company - admittedly, not by plaintiff. The fair inference and the legal presumption arises upon the record that the decedent paid it. Decedent died in June, 1939, and defendant took complete charge of her estate and property and took care of

2.

all arrangements for the burial, the decedent having no relatives or next of kin.

Plaintiff claims that at the suggestion of the decedent, she left with the latter these notes and other papers originally given to her by decedent, for safekeeping. After her death they found in a box among the effects of decedent the two notes, uncanceled, the one for \$11,400 and the \$7500 note. Plaintiff claims that she had never been paid the \$7500 note. At the suggestion of plaintiff, defendant, after taking complete charge of the effects and estate of the decedent, executed a new note to replace the \$7500 note and signed it "Marguerite Wazau by Adella E. Knight". Why she did so, she could not explain, except that it was at the request and direction of the plaintiff, in whom she had confidence. She received nothing for that note from plaintiff. Payments were made upon this note from proceeds of the estate of decedent. Defendant also turned over to plaintiff some of the personal effects, furnishings and furniture belonging to the decedent, for which credit was given upon the note, so that it left a balance of \$3730. It appears plaintiff suggested to defendant that she would rather have a note without the name of the decedent on it and asked defendant to sign a new note with the defendant as the maker. Defendant followed the suggestion and direction of plaintiff but received nothing for her individual note, dated September 25, 1940, being the note herein sued upon.

The defense was want of consideration. Plaintiff's theory is that the giving of the latter note constituted a novation; that the consideration for the note was the waiver of the claim by plaintiff against the estate of the decedent and forbearance in not suing the estate of decedent. Plaintiff admits that defendant never asked her to waive her claim or refrain from filing the same against the estate. This is the only consideration claimed for the note in question.

Plaintiff admits that the original loan from the insurance

all arrangements for the burial, the decedent having no relatives or next of kin.

Plaintiff claims that at the suggestion of the decedent, she left with the latter these notes and other papers originally given to her by decedent, for safekeeping. After her death they found in a box among the effects of decedent the two notes, uncanceled, the one for \$11,400 and the \$7500 note. Plaintiff claims that she had never been paid the \$7500 note. At the suggestion of plaintiff, defendant, after taking complete charge of the effects and estate of the decedent, executed a new note to replace the \$7500 note and signed it "Marjorie Warren by Adella E. Knight". Why she did so, she could not explain, except that it was at the request and direction of the plaintiff, in whom she had confidence. She received nothing for that note from plaintiff. Payments were made upon this note from proceeds of the estate of decedent. Defendant also turned over to plaintiff some of the personal effects, furnishings and furniture belonging to the decedent, for which credit was given upon the note, so that it left a balance of \$2730. It appears plaintiff suggested to defendant that she would rather have a note without the name of the decedent on it and asked defendant to sign a new note with the defendant as the maker. Defendant folloed the suggestion and direction of plaintiff but received nothing for her individual note, dated September 25, 1940, being the note herein sued upon. The defense was want of consideration. Plaintiff's theory is that the giving of the latter note constituted a novation; that the consideration for the note was the giving of the claim by plaintiff against the estate of the decedent and forbearance in not suing the estate of decedent. Plaintiff admits that defendant never asked her to waive her claim or refrain from suing the estate against the estate. This is the only consideration claimed for the note in question. Plaintiff admits that the original loan from the insurance

3.

company was not repaid to the insurance company by her, and she does not show that she remained in any way liable to the insurance company for that loan. Presumably, the obligation to the insurance company for the loan obtained from it was paid by the decedent. Since the \$11,400 note was fully discharged by the transfer to the plaintiff of the apartment referred to, and yet found uncanceled among the effects of the decedent, it is a fair inference and the legal presumption arises from all of the evidence that the \$7500 note found among the effects of the decedent was equally discharged by the payment to the insurance company, even though said note was found uncanceled. An uncanceled note found among the effects of the maker, after the death of the maker, carries with it the presumption that the note had been paid. Cassem v. Heustig, 201 Ill. 208, 228; Michaelson v. Doonan, 259 Ill. App. 337; Commercial Credit Co. v. Maxey, 289 Ill. App. 209. If the \$7500 note, representing the borrowing from the insurance company, had been discharged by the repayment of the loan to the insurance company, then it was no longer a valid obligation and the substitution of the note of the defendant, at the request of plaintiff, for that of the decedent, carried no consideration with it. The original note having been discharged, there remained no valid claim upon that note against the decedent in her lifetime or against her estate. There being no liability of the estate to the plaintiff, there could be no legal waiver of claim or forbearance by the plaintiff. Hence, a valid consideration for the note of defendant in substitution for the note of deceased is entirely lacking.

The judgment of the lower court is affirmed.

AFFIRMED.

O'Connor, P. J., and Niemeyer, J., concur.

company was not repaid to the insurance company by her, and she does not show that she remained in any way liable to the insurance company for that loan. Presumably, the obligation to the insurance company for the loan obtained from it was paid by the decedent. Since the \$1,400 note was fully discharged by the transfer to the plaintiff of the apartment referred to, and yet found unenclosed among the effects of the decedent, it is a fair inference and the legal presumption arises from all of the evidence that the \$500 note found among the effects of the decedent was equally discharged by the payment to the insurance company, even though said note was found unenclosed. An unenclosed note found among the effects of the maker, after the death of the maker, carries with it the presumption that the note had been paid. Gardner v. Henshaw, 201 Ill. 208, 228; Michaelson v. Doonan, 239 Ill. App. 337; Commercial Credit Co. v. Mayes, 239 Ill. App. 205. If the \$500 note, representing the borrowing from the insurance company, had been discharged by the repayment of the loan to the insurance company, then it was no longer a valid obligation and the substitution of the note of the defendant, at the request of plaintiff, for that of the decedent, carried no consideration with it. The original note having been discharged, there remained no valid claim upon that note against the decedent in her lifetime or against her estate. There being no liability of the estate to the plaintiff, there could be no legal waiver of claim or forbearance by the plaintiff. Hence, a valid consideration for the note of defendant in substitution for the note of decedent is entirely lacking.

The judgment of the lower court is affirmed.

ATTESTED.

O'Connor, P. J., and Niemeyer, J., concur.

43821

LILLIE JANE ROSENSTIEL,
Appellee,

v.

OTTO VIERNOW,

Appellant.

20
A
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

329 I.A. 536²

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$250 entered on the verdict of a jury in plaintiff's action based on defendant's promise to pay her \$250 if she procured a purchaser for defendant's property in which plaintiff was living. The question presented to us is one of fact.

Plaintiff testified that she told her neighbor across the street, Mrs. McQuigg, that the property was for sale; that later Mrs. McQuigg brought over Mr. McCall and Dr. Gruneck, the latter being the ultimate purchaser of the property, to examine the premises; that she took them over the house, told about the heating plant and the different advantages and gave Mr. McCall the name and address of the owner and told him he could talk to the owner about the property; that she later called up defendant's home and in his absence gave his sister the name of the people who had looked at the property; that after the contract of sale had been signed defendant told her the property had been sold, and promised to pay her the \$250 when the deal was closed. Dr. Gruneck, the purchaser, testified that he learned that the property was for sale through Mr. McCall and went with McCall when he examined the property; that McCall was not interested; that he learned through McCall who the owner was; that he told the owner that plaintiff had shown him the property; that plaintiff did not go into the house and write down defendant's

43821

LILLIE JANE ROSENSTIEL,
Appellee,

v.

OTTO VERNOW,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE WINSTON DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment for \$250 entered on the verdict of a jury in plaintiff's action based on defendant's promise to pay her \$250 if she procured a purchaser for defendant's property in which plaintiff was living. The question presented to us is one of fact.

Plaintiff testified that she told her neighbor across the street, Mrs. McGuigg, that the property was for sale; that later Mrs. McGuigg brought over Mr. McCall and Dr. Grunewald, the latter being the ultimate purchaser of the property, to examine the premises; that she took them over the house, told about the heating plant and the different advantages and gave Mr. McCall the name and address of the owner and told him he could talk to the owner about the property; that she later called up defendant's home and in his absence gave his sister the name of the people who had looked at the property; that after the contract of sale had been signed defendant told her the property had been sold, and promised to pay her the \$250 when the deal was closed. Dr. Grunewald, the purchaser, testified that he learned that the property was for sale through Mr. McCall and went with McCall when he examined the property; that McCall was not interested; that he learned through McCall who the owner was; that he told the owner that plaintiff had shown him the property; that plaintiff did not go into the house and write down defendant's

2.

name on a piece of paper and give it to McCall.

Defendant testified that prior to the signing of the contract of sale on April 12, 1945 he told plaintiff that it would be worth her while if she found a buyer; that she called him and told him she had some friends looking at the property; that the next day after signing the contract he told her the property had been sold; that he did not tell her he would pay her \$250 when he closed the deal.

The jury accepted plaintiff's version of the transaction, and the trial court, who saw and heard the witnesses when testifying, has approved the verdict of the jury. There are no facts or circumstances in evidence detracting from plaintiff's testimony or strengthening that of defendant. The verdict is not against the manifest weight of the evidence. The facts testified to by plaintiff establish her right, as the procuring cause in the sale of the property to Dr. Gruneck, to the compensation agreed upon.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Feinberg, J., concur.

name on a piece of paper and give it to McGall.

Defendant testified that prior to the signing of the contract of sale on April 18, 1946 he told plaintiff that it would be worth her while if she found a buyer; that she called him and told him she had some friends looking at the property; that the next day after signing the contract he told her the property had been sold; that he did not tell her he would pay her \$250 when he closed the deal.

The jury accepted plaintiff's version of the transaction,

and the trial court, who saw and heard the witnesses when

testifying, has approved the verdict of the jury. There are no

facts or circumstances in evidence detracting from plaintiff's

testimony or strengthening that of defendant. The verdict is not

against the manifest weight of the evidence. The facts testified

to by plaintiff establish her right, as the procuring cause

in the sale of the property to Mr. Grunewald, to the compensation

agreed upon.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Reinberg, J., concur.

Abstract
No. 10069

In the
APPELLATE COURT OF ILLINOIS
Second District

February Term, A. D. 1946

329 I.A. 42

Clayton C. Harbeck, Sheriff of LaSalle)
County, Illinois, and Walter W. Halm,)
d.b.a. Halm Motor Service,)

Plaintiffs-Appellees,)

vs.)

Harry A. Lyon,)

Defendant-Appellant.)

Appeal from

Circuit Court of
LaSalle County

Honorable Frank H. Hayes

Judge Presiding.

Bristow, J.--This is an appeal by defendant, Harry A. Lyon from a judgment by agreement entered in a pre-trial hearing of a replevin proceeding in the Circuit Court of LaSalle County, and also from the order denying the motion to vacate and set aside the said judgment.

The sequence of events and facts appearing from the pleadings and affidavits filed in support thereof, indicate that the defendant is the owner of a Chevrolet truck and that the plaintiff, Walter Halm, doing business as Halm's Motor Service, filed in the office of the county recorder, a notice of lien under Section 40 of Chapter 82 of the Illinois Revised Statutes for labor and materials, in the amount of \$84.33, and also : certified a copy of the lien with the plaintiff Clayton C. Harbeck, the county sheriff. The latter seized defendant's truck, whereupon defendant filed his written verified denial of the claim with the sheriff and deposited with him the sum of \$134.35 in compliance with the terms of the Lien Act.

Plaintiff Halm did not enforce his lien according to the method provided in the Statute (Sec. 45, chap.82, Ill. Rev.

Stats. 1945) which requires the filing of a complaint in equity to foreclose the lien within ten days from the filing of the written denial. He alleges that he was justified in not pursuing this remedy inasmuch as the denial filed by the defendant was not verified and, therefore, did not constitute a proper denial under the terms of the Statute.

Plaintiff Halm and the Sheriff, plaintiff Harbeck, filed, instead, an affidavit of replevin alleging that the Sheriff was entitled to possession of the truck which defendant had wrongfully detained from him.

The writ of replevin was issued and directed the coroner to replevy the truck and deliver it to the plaintiff Harbeck. Defendant answered the complaint, and a pre-trial hearing was held, at the conclusion of which the court entered a consent judgment in the cause.

The said judgment recited in substance that the court having heard the evidence and by agreement of the parties and their respective counsel orders and decrees that the replevin suit be dismissed at cost of the plaintiffs, and that neither the plaintiffs nor the defendant shall hereinafter have any cause of action, claim or demand against each other for or on account of any demand whatsoever accruing prior to this date, and, further, that the defendant pay to Milton J. Formhals the sum of \$25.00 in full of all claims for storage.

Defendant paid the \$25.00 to plaintiffs' attorney the date the judgment was entered. Plaintiffs, however, failed to return the truck to defendant, or to pay the remainder of the storage bill, and defendant was obliged to pay the sum of \$84.50 before he could secure his truck.

Defendant, thereupon, filed a motion and supporting affidavits to vacate and set aside the judgment on the ground that it was void and that he had a good defense to the merits. This motion was denied, and from the denial thereof, defendant has

State. 1915) which contains the following: "The plaintiff in equity
in this case the defendant has been found to be guilty of the
defendant's crime. He alleges that he was innocent of the crime
and that he was innocent of the crime as the defendant filed by the
and was not verified and, therefore, did not constitute a
proper denial under the terms of the statute.
The plaintiff held and the defendant, defendant's name, filed,
instead, an affidavit of veracity stating that the plaintiff
was entitled to possession of the tract which defendant had
wrongfully obtained from him.
The writ of replevin was issued and returned to the plaintiff
to recover the tract and deliver it to the defendant's attorney.
Defendant appeared to the writ, and a motion for judgment was
made, at the conclusion of which the court entered a judgment
judgment in the cause.
The said judgment recited in substance that the court
having found the evidence and the judgment of the plaintiff and
their respective counsel correct and agrees that the plaintiff
is entitled to possession of the tract, and that the
defendant is not the defendant should deliver the tract and
the tract to the plaintiff, and the plaintiff was ordered to
an account of any losses, damages, expenses incurred by the
plaintiff, and the defendant, that the defendant pay to the plaintiff the
sum of \$50.00 in full of all claims for damages.
Defendant paid the \$50.00 to plaintiff's attorney for the
the judgment was entered. The plaintiff, however, failed to return
the tract to defendant, so as to be the plaintiff of the charges
will, and defendant was obliged to pay the sum of \$50.00
before he could recover his tract.
Defendant, therefore, filed a motion and affidavit stating
that to vacate and set aside the judgment on the ground that
it was void and that he had a good defense to the writ. This
motion was denied, and from the denial thereof, defendant has

appealed to this court.

Before this court can take cognizance of any defense on the merits which defendant or his counsel might have interposed and maintained in the trial court, it must be determined whether or not the consent judgment entered in a pre-trial hearing of a replevin suit may be appealed from or set aside on motion.

It is established law that where the court exceeds its jurisdiction and enters a judgment beyond its authority, the judgment is void and may be collaterally attacked and set aside on motion. *Thayer v. Village of Downer's Grove*, 369 Ill. 339. However, in the cases cited and relied upon by defendant, none of the judgments held void were consent judgments, nor were they declared invalid on the ground that the court was not authorized to sanction an agreement between the parties.

In the absence of a binding precedent, therefore, this court must determine whether the provisions of the Replevin Act limit the type of judgment which may be entered by the court and thereby render invalid a judgment by consent.

Section 22 of the Replevin Act (ch. 119 Ill. Rev. Stats., 1945) provides essentially that if the finding be against the plaintiff the judgment shall be for a return of the property and damages for its use; whereas if the judgment be for the plaintiff, he shall recover damages for the wrongful detention thereof by the defendant.

Defendant contends that this section limited the character of the judgment the court was authorized to enter, and, therefore, the judgment by agreement exceeded the jurisdiction of the court and was consequently void.

It is a cardinal principle of statutory construction that a statute must be construed as a whole in order that proper emphasis and interpretation be given to each provision. Section 21a, added in 1935 to the Replevin Act, expressly provides that the provisions of the Civil Practice Act shall apply to all

appealed to this court.

Before this court the consideration of the appeal was

the writs which defendant in his answer might have obtained
and which in the trial court, it was the duty of the

court to grant if the answer showed that the writs

were necessary and proper in the circumstances of the case.

on motion.

It is established law that where the facts are such that

the writs are necessary and proper, the court is bound to

grant them if the answer shows that the writs are necessary

and proper. *Thayer v. Williams*, 100 Cal. 320.

However, in the case cited and relied upon by defendant, none

of the judgments which were entered in the trial court

they declared invalid on the ground that the writs were not

authorized to issue on a writ of habeas corpus.

In the absence of a binding precedent, therefore, this

court must determine whether the provisions of the statute

do limit the issue of judgment which may be entered by the

court and thereby render invalid a judgment by consent.

Section 31 of the Revenue Act (Cal. Civ. Code, sec. 31)

(1905) provides substantially that in the trial court

the plaintiff the defendant shall be the owner of the prop-

erty and the defendant shall be the owner of the property in the

the plaintiff, or shall receive damages for the property in the

action brought by the defendant.

Defendant contends that the section limits the operation

of the judgment to the issue of ownership, and that, there-

fore, the judgment by consent entered in the trial court of

the court is not binding on the parties.

It is a general principle of statutory construction that

all laws must be construed so as to give effect to their proper

objects and interpretation of the statute is to be made

in accordance with the intent of the legislature, and that

the provisions of the Civil Practice Act shall apply to all

proceedings thereunder in courts of record, except as otherwise provided in the Replevin Act.

It is the opinion of this court that this section indicates a clear legislative intent not to limit or circumscribe the procedure under the Replevin statute as though it were a complete code unto itself, but rather to supplement it by the rules of the Civil Practice Act to achieve greater uniformity of procedure, unless those rules are in conflict with the express terms of the Replevin Act.

There is no provision in the Replevin Act pertaining to pre-trial hearings or consent judgments, and it would appear to this court that the situation is within the contemplated purpose of Section 21a, and is, therefore, a proper case for the application of the Civil Practice Act. Moreover, it has been held in cases under other special statutes, i. e., Forcible Entry and Detainer Act, Workmen's Compensation Act, that where the special statutes are silent, the provisions of the Civil Practice Act are applicable. *Wainscott v. Pennikoff*, 287 Ill. App. 78; *Wintersteen v. Nat. Cooperage Co.*, 361 Ill. 95.

Under the terms and provisions of the Civil Practice Act, (sec. 182a, ch. 110, Ill. Rev. Stats., 1945) authority is given to the trial court to direct parties to appear before it for a pre-trial conference to consider any matter as may aid in the disposition of the action. This provision is supplemented by the Supreme Court rules relative to pre-trial procedures, (Sec. 259. 23a, ch. 110, Ill. Rev. Stats., 1945) which provide that "the Court shall make an order which recites the agreements made by the parties as to any of the matters considered; and such order, when entered, shall control the subsequent course of the action."

Therefore, the action of the court in the instant case in entering a consent judgment at the pre-trial hearing was clearly authorized by the Civil Practice Act and the rules promulgated by the Supreme Court

proceeding a proceeding to remove of record, without a discharge

granted in the negative.

It is the opinion of the court that the writ is

limited to a writ of habeas corpus and is not a writ

which the court has the right to grant as a matter of

course or as a matter of right, but rather as a

matter of discretion, and the court has the right to

refuse to grant it, unless there is some good reason

for the exercise of the writ.

There is no question in the negative of the writ

of habeas corpus or of habeas corpus, and it is not

to this court that the writ is a writ of habeas

corpus, and it is not a writ of habeas corpus, and it

is not a writ of habeas corpus, and it is not a

writ of habeas corpus, and it is not a writ of

habeas corpus, and it is not a writ of habeas

corpus, and it is not a writ of habeas corpus, and

it is not a writ of habeas corpus, and it is not

a writ of habeas corpus, and it is not a writ of

habeas corpus, and it is not a writ of habeas

corpus, and it is not a writ of habeas corpus, and

it is not a writ of habeas corpus, and it is not

a writ of habeas corpus, and it is not a writ of

habeas corpus, and it is not a writ of habeas

corpus, and it is not a writ of habeas corpus, and

it is not a writ of habeas corpus, and it is not

a writ of habeas corpus, and it is not a writ of

habeas corpus, and it is not a writ of habeas

corpus, and it is not a writ of habeas corpus, and

it is not a writ of habeas corpus, and it is not

a writ of habeas corpus, and it is not a writ of

habeas corpus, and it is not a writ of habeas

corpus, and it is not a writ of habeas corpus, and

it is not a writ of habeas corpus, and it is not

a writ of habeas corpus, and it is not a writ of

habeas corpus, and it is not a writ of habeas

It is the settled law of this state, moreover, that where the parties to a cause have consented to the entry of a decree, they are bound thereby; and that where such decree is sanctioned by the court, it has the same force and effect as a judgment or decree entered after a contest, unless the consent of the complaining party was procured by fraud.

People v. Spring Lake Drainage Dist., 253 Ill. 479, 491; Bergman v. Rhodes, 334 Ill. 137; Consaer v. Wisniewski, 293 Ill. App. 529; City of Kankakee v. Lang, 323 Ill. App. 14.

In the recent case of First National Bank of Chicago v. Whitlock, 327 Ill. App. 127, the court reviewed the cases involving the legal effect of consent decrees. At p. 138, the court quoted with approval the following excerpt from People v. Spring Lake Drainage Dist., supra:

"A consent decree is one based upon the consent or agreement of the parties which may supercede both pleading and evidence, and even go to the extent of . . . limiting the relief to be granted. Such a decree is absolutely conclusive upon the consenting parties, and can not be amended or varied without like consent, nor can it be reheard, appealed from, or reviewed upon writ of error."

This rule is predicated upon the sound reason that a party can not complain of an error which he himself induced the court to make. People v. Joliet Trust & Savings Bank, 315 Ill. App. 11, 15.

In the instant case defendant contends further that the judgment of the court is void because at the time it was entered, he was not informed, and did not agree that all rights of action he might have against the plaintiffs prior to the date of the judgment were to be barred.

This contention cannot be sustained by this court, for, irrespective of what the defendant may or may not have actually understood, he was represented by licensed legal counsel, who was deemed to be sufficiently competent to comprehend the nature of the agreement and the order of the court pursuant thereto.

THE UNIVERSITY OF CHICAGO

[illegible]

1900-1901. 1902-1903. 1904-1905. 1906-1907. 1908-1909. 1910-1911. 1912-1913. 1914-1915. 1916-1917. 1918-1919. 1920-1921. 1922-1923. 1924-1925. 1926-1927. 1928-1929. 1930-1931. 1932-1933. 1934-1935. 1936-1937. 1938-1939. 1940-1941. 1942-1943. 1944-1945. 1946-1947. 1948-1949. 1950-1951. 1952-1953. 1954-1955. 1956-1957. 1958-1959. 1960-1961. 1962-1963. 1964-1965. 1966-1967. 1968-1969. 1970-1971. 1972-1973. 1974-1975. 1976-1977. 1978-1979. 1980-1981. 1982-1983. 1984-1985. 1986-1987. 1988-1989. 1990-1991. 1992-1993. 1994-1995. 1996-1997. 1998-1999. 2000-2001. 2002-2003. 2004-2005. 2006-2007. 2008-2009. 2010-2011. 2012-2013. 2014-2015. 2016-2017. 2018-2019. 2020-2021. 2022-2023. 2024-2025. 2026-2027. 2028-2029. 2030-2031. 2032-2033. 2034-2035. 2036-2037. 2038-2039. 2040-2041. 2042-2043. 2044-2045. 2046-2047. 2048-2049. 2050-2051. 2052-2053. 2054-2055. 2056-2057. 2058-2059. 2060-2061. 2062-2063. 2064-2065. 2066-2067. 2068-2069. 2070-2071. 2072-2073. 2074-2075. 2076-2077. 2078-2079. 2080-2081. 2082-2083. 2084-2085. 2086-2087. 2088-2089. 2090-2091. 2092-2093. 2094-2095. 2096-2097. 2098-2099. 2100-2101. 2102-2103. 2104-2105. 2106-2107. 2108-2109. 2110-2111. 2112-2113. 2114-2115. 2116-2117. 2118-2119. 2120-2121. 2122-2123. 2124-2125. 2126-2127. 2128-2129. 2130-2131. 2132-2133. 2134-2135. 2136-2137. 2138-2139. 2140-2141. 2142-2143. 2144-2145. 2146-2147. 2148-2149. 2150-2151. 2152-2153. 2154-2155. 2156-2157. 2158-2159. 2160-2161. 2162-2163. 2164-2165. 2166-2167. 2168-2169. 2170-2171. 2172-2173. 2174-2175. 2176-2177. 2178-2179. 2180-2181. 2182-2183. 2184-2185. 2186-2187. 2188-2189. 2190-2191. 2192-2193. 2194-2195. 2196-2197. 2198-2199. 2200-2201. 2202-2203. 2204-2205. 2206-2207. 2208-2209. 2210-2211. 2212-2213. 2214-2215. 2216-2217. 2218-2219. 2220-2221. 2222-2223. 2224-2225. 2226-2227. 2228-2229. 2230-2231. 2232-2233. 2234-2235. 2236-2237. 2238-2239. 2240-2241. 2242-2243. 2244-2245. 2246-2247. 2248-2249. 2250-2251. 2252-2253. 2254-2255. 2256-2257. 2258-2259. 2260-2261. 2262-2263. 2264-2265. 2266-2267. 2268-2269. 2270-2271. 2272-2273. 2274-2275. 2276-2277. 2278-2279. 2280-2281. 2282-2283. 2284-2285. 2286-2287. 2288-2289. 2290-2291. 2292-2293. 2294-2295. 2296-2297. 2298-2299. 2300-2301. 2302-2303. 2304-2305. 2306-2307. 2308-2309. 2310-2311. 2312-2313. 2314-2315. 2316-2317. 2318-2319. 2320-2321. 2322-2323. 2324-2325. 2326-2327. 2328-2329. 2330-2331. 2332-2333. 2334-2335. 2336-2337. 2338-2339. 2340-2341. 2342-2343. 2344-2345. 2346-2347. 2348-2349. 2350-2351. 2352-2353. 2354-2355. 2356-2357. 2358-2359. 2360-2361. 2362-2363. 2364-2365. 2366-2367. 2368-2369. 2370-2371. 2372-2373. 2374-2375. 2376-2377. 2378-2379. 2380-2381. 2382-2383. 2384-2385. 2386-2387. 2388-2389. 2390-2391. 2392-2393. 2394-2395. 2396-2397. 2398-2399. 2400-2401. 2402-2403. 2404-2405. 2406-2407. 2408-2409. 2410-2411. 2412-2413. 2414-2415. 2416-2417. 2418-2419. 2420-2421. 2422-2423. 2424-2425. 2426-2427. 2428-2429. 2430-2431. 2432-2433. 2434-2435. 2436-2437. 2438-2439. 2440-2441. 2442-2443. 2444-2445. 2446-2447. 2448-2449. 2450-2451. 2452-2453. 2454-2455. 2456-2457. 2458-2459. 2460-2461. 2462-2463. 2464-2465. 2466-2467. 2468-2469. 2470-2471. 2472-2473. 2474-2475. 2476-2477. 2478-2479. 2480-2481. 2482-2483. 2484-2485. 2486-2487. 2488-2489. 2490-2491. 2492-2493. 2494-2495. 2496-2497. 2498-2499. 2500-2501. 2502-2503. 2504-2505. 2506-2507. 2508-2509. 2510-2511. 2512-2513. 2514-2515. 2516-2517. 2518-2519. 2520-2521. 2522-2523. 2524-2525. 2526-2527. 2528-2529. 2530-2531. 2532-2533. 2534-2535. 2536-2537. 2538-2539. 2540-2541. 2542-2543. 2544-2545. 2546-2547. 2548-2549. 2550-2551. 2552-2553. 2554-2555. 2556-2557. 2558-2559. 2560-2561. 2562-2563. 2564-2565. 2566-2567. 2568-2569. 2570-2571. 2572-2573. 2574-2575. 2576-2577. 2578-2579. 2580-2581. 2582-2583. 2584-2585. 2586-2587. 2588-2589. 2590-2591. 2592-2593. 2594-2595. 2596-2597. 2598-2599. 2600-2601. 2602-2603. 2604-2605. 2606-2607. 2608-2609. 2610-2611. 2612-2613. 2614-2615. 2616-2617. 2618-2619. 2620-2621. 2622-2623. 2624-2625. 2626-2627. 2628-2629. 2630-2631. 2632-2633. 2634-2635. 2636-2637. 2638-2639. 2640-2641. 2642-2643. 26

City of Los Angeles, California

In the second case of the 1940s, I noticed that the same person was

1917

[illegible]

1911

With reference to the personal understanding of the defendant, the Illinois Supreme Court, in Bergman v. Rhodes, 334 Ill. 137, quoted with approval the rule enunciated by the court in Hungarian Benevolent Society v. Society, 283 Ill. 99:

"... that where an attorney is the counsel of record for a client, his agreement in the conduct and management of the litigation must be considered as the agreement of his client and if any of his acts are without sufficient authority as between him and his client the remedy is against the counsel."

By virtue of the foregoing authorities, it is the opinion of this court that the judgment by agreement between the parties in the instant case was within the jurisdiction of the court and could not be set aside on a motion, therefor, nor is it subject to review on this appeal. It is not necessary, therefore, to consider the defense on the merits which defendant ably presents in his brief and argument. It is well established that parties to a pending case may agree to the rendition of a decree involving any right which may be the subject of litigation, and in the instant case defendant chose, through his counsel, not to press his defense, however meritorious it may have been, in the replevin suit and agreed to terminate the litigation according to the agreement incorporated in the judgment. He cannot now repudiate this agreement.

Defendant calls the attention of the court to the alleged misconduct of the plaintiffs, whereby they failed to return the truck and to pay the remainder of the storage thereon, and defendant was required to pay \$84.50 in order to secure possession of his truck.

Inasmuch as the court may look to the whole record to determine the nature and scope of the judgment, Wahl v. Schmidt, 317 Ill. 331, 342, in the case at bar it can be fairly implied from the judgment dismissing the case and charging the costs to plaintiffs that they were to return the truck and pay the remainder of the storage. This is particularly evident from the statement in the decree that the \$25.00 to be paid by the defendant was "in full of all claims for storage."

With the help of the following information, the following information is provided:

[Faint handwritten notes at the bottom of the page]

[illegible]

19

RECEIVED

THE UNIVERSITY OF CHICAGO

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

101-1074248-003 21-11-2009 20190321 07 20190321

0.07 (p = 7.14e-16) \leq 0.07, 3.40 \leq 0.07 (p = 4.47e-16) \leq 0.07, 3.40 \leq 0.07

*, *Myrica* and *Salix* in 1960 and 1961.

The fact that the plaintiffs did not comply with the implied terms of the order does not mollify or change the binding effect of the consent judgment, nor warrant its being set aside. However, there is nothing in the terms of the said judgment which bars or precludes defendant from pursuing any rights he may have against plaintiffs for their failure to comply with the order of the court, inasmuch as such rights have arisen subsequent to the rendition of the judgment.

The statement in the decree barring each party from bringing any action against the other "any cause of action, claim or demand whatsoever accruing prior to this date," can legitimately be interpreted to refer only to claims arising out of the various transactions over the possession of the truck prior to the entry of the decree. Clearly it can not be construed, as defendant urges, to bar claims involving matters not before the court, for such an interpretation would be in manifest disregard of the record.

It is the decision of this court that inasmuch as the Circuit Court had jurisdiction of the parties and of the subject matter, and authority to enter a judgment by consent and agreement of the parties, through their respective counsels, the judgment entered by the court is valid and in full force and effect, and should be affirmed.

JUDGMENT AFFIRMED.

1000

A large, dark, handwritten 'X' mark, likely indicating a correction or a specific point of interest on the page.

Abstract

7543

Appeal from the
Circuit Court, DuPage
County

Honorable Chas. A. O'Conner
Judge Presiding

Gizella Schweidler,

Judge Presiding

329 I.A. 043

329 I.A. 043

329 I.A. 043

329 I.A. 043

11.7.2

Vol. 101

in the

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1922

Case No. 123

Abstract

Answer from the

Olson & Co., Inc.
Chicago

Rich of Sch. 123

Respondent, Plaintiff-Appellant

vs.

Charles Sch. 123

Petitioner, Defendant-Appellee

Just. Printing

8521A.013

Exhibit, 1.—This is an appeal by Charles Sch. 123, the
 petitioner, from an order of the circuit court of DuPage County
 made in his petition to nullify the alimony provisions of a
 decree entered May 6, 1920.
 The petition alleges, in substance, that under the terms
 of the said decree petitioner was to receive a divorce from
 Richard Sch. 123, the respondent herein, on the ground of
 extreme and repeated cruelty, and respondent was ordered to
 pay her \$10.00 per week for her maintenance.
 It is further alleged that since the entry of the said
 decree the circumstances of both the petitioner and respondent
 have changed sufficiently to warrant an increase in the amount
 of alimony payable to the petitioner. The specific charges
 relied upon are: that the income of the respondent is greater;
 that petitioner has been residing in a more expensive place;
 money received by her as alimony which she has not required
 to pay at the date of the entry of the original decree;
 that respondent has been relieved from paying any income tax
 on his alimony payment; that respondent is required
 to make payments of the cost of, and pay the general taxes
 on the premises occupied by the petitioner, whose petition
 is now returned to pay the special property taxes; and finally,

that the cost of living has materially advanced.

Respondent contends, however, that the necessity of the petitioner has not increased since the date of the decree and that respondent's ability to contribute has not changed sufficiently to warrant a modification of the original alimony provisions.

On the basis of the testimony and exhibits offered in evidence, the circuit court dismissed the petition in an order finding that the terms of the original decree incorporated a property settlement between the parties, and that the present circumstances did not warrant an increase in the amount of alimony.

From this order, the petitioner has appealed, and the sole inquiry presented on this review is whether the circuit court erred in concluding that the present circumstances of the parties did not warrant an increase in the amount of alimony payable to the petitioner.

Under the terms and provisions of section 18 of the Divorce Act, (ch. 40, Ill. Rev. Stats., 1945) "the court may make such alterations in the allowance of alimony...as shall appear reasonable and proper."

This section of the statute has been construed in *Herrick v. Herrick*, 319 Ill. 146, to authorize the court to modify the alimony terms whenever the circumstances warrant irrespective of whether the original decree incorporated a property settlement.

In the *Herrick* case, *supra*, the court stated at p. 142: "The fact that the provision made for the support and maintenance of the wife is incorporated in the decree by agreement of the parties adds nothing to the force and effect of the decree and does not affect the power of the court to enter further orders respecting alimony." (citations)

In the instant case petitioner contends that the circuit court did not follow this established precedent and denied the petition on the ground that the original settlement barred an increase in alimony. The reference by the court to the property settlement was made solely in support of its conclusion that the original alimony terms are presently adequate, and not as a denial of the power of the court to modify the terms. There-

that the cost of living has materially advanced.

Relevant contents, however, that the necessity of the petitioner has not increased since the date of the decree and that respondent's ability to contribute has not changed materially to warrant a modification of the original alimony provisions.

On the basis of the testimony and exhibits offered in evidence, the circuit court found that the petitioner is finding that the terms of the original decree incorporated a property settlement between the parties, and that the present circumstances did not warrant an increase in the amount of alimony.

From this order, the petitioner has appealed, and the case is pending on this review to determine whether the circuit court erred in concluding that the present circumstances of the parties did not warrant an increase in the amount of alimony payable to the petitioner.

Under the terms and provisions of section 18 of the Divorce Act, (Ch. 40, Ill. Rev. Stat., 1945) "the court may make such alterations in the amount of alimony... as shall appear reasonable and proper."

This section of the statute has been construed in *Herlick v. Herlick*, 219 Ill. 148, to authorize the court to modify the alimony terms whenever the circumstances warrant irrespective of whether the original decree incorporated a property settlement.

In the *Herlick* case, above, the court stated at p. 149: "The fact that the wife is a dependent in the home and that the husband is the sole provider of the family and effect of the decree and does not affect the power of the court to enter further orders respecting alimony." (citations)

In the instant case, petitioner contends that the circuit court did not follow the established procedure in denied the petition on the ground that the original settlement barred an increase in alimony. The response by the court to the property settlement was made solely in support of its conclusion that the original alimony terms are essentially adequate, and not a denial of the power of the court to modify the terms. There-

fore, the attention of this court will be directed to the facts and circumstances relied upon by petitioner as warranting an increase in alimony.

The Illinois Supreme Court in Smith v. Smith, 334 Ill. 370, has enunciated the test to be applied in determining whether the circumstances warrant a change in the alimony provisions of a decree. The court stated at p. 382:

"The criterion is...Has the necessity of the petitioner changed since the rendition of the decree, and has the ability of the husband to contribute to it also changed." Craig v. Craig, 163 Ill. 176.

On the date of the original divorce decreethe respondent's earnings were approximately \$4,000 a year and he was heavily indebted. Under the alimony provisions petitioner was awarded the car and the homestead, and respondent was ordered to pay the interest and principal of the mortgage, and all taxes on the premises until the mortgage would be paid. In addition thereto, respondent was required to ~~pay~~^{pay} petitioner \$20.00 per week for her maintenance and support, which sum was not to be reduced when the minor child reached the age of eighteen.

In support of her petition for increased alimony petitioner has adduced evidence to show that according to his income tax returns, the net income of respondent increased in 1944 to \$5,894, and in 1945 to \$7,624. As a result of the change in the federal income tax law (subdivision k, sec. 22, Internal Revenue Code, U.S.C.A.) respondent is authorized to deduct alimony payments in the computation of his tax, whereby he effected a savings of some \$200.00 each year, whereas, petitioner has been required to pay an average tax of 117.00 per year on a total income of \$1,040.

Petitioner further calls attention to the court to the fact that she now has the additional burden of paying the general property taxes on the homestead, which amount to approximately \$100.00 yearly. Moreover, petitioner is 65 years old and her health is somewhat impaired, thereby necessitating

Now, the attention of this court will be directed to the facts and circumstances relied upon by petitioner as tending to show an increase in alimony.

The Illinois Supreme Court in *Smith v. Smith*, 353 Ill. 370, has annulled the test to be applied in determining whether the circumstances warrant a change in the alimony payments of a decree. The court stated at p. 383:

"The criterion is... Has the necessity of the maintenance changed since the rendition of the decree, and has the ability of the husband to contribute to it also changed." *Smith v. Smith*, 353 Ill. 370.

On the date of the original divorce decree the respondent's earnings were approximately \$4,000 a year and he was heavily indebted. Under the alimony provisions petitioner was ordered to pay the car and the household, and respondent was ordered to pay the interest and principal of the mortgage, and all taxes on the property until the mortgage would be paid. In addition, therefore, respondent was required to pay petitioner \$20.00 per week for her maintenance and support, which sum was not to be reduced when the minor child reached the age of eighteen.

In support of her petition for increased alimony petitioner has introduced evidence to show that according to his income tax returns, the net income of respondent increased in 1947 to \$5,624, and in 1948 to \$7,824. As a result of the change in the federal income tax law (Revenue Act of 1942, Internal Revenue Code, U.S.C.A.) respondent is entitled to deduct all tax payments in the computation of his tax, whereby he effected a savings of some \$200.00 each year, whereas, petitioner has been required to pay an income tax of \$17.00 per year on a total income of \$1,040.

Petitioner further calls attention to the court to the fact that she now has the additional burden of paying the general property taxes on the household, which amount to approximately \$10.00 yearly. Moreover, petitioner is 35 years old and her health is somewhat fragile, thereby necessitating

certain medical expenditure. Finally, reference is made to the increased cost of living whereby the purchasing power of \$20.00 is markedly reduced. This latter circumstance does not constitute a material factor inasmuch as it affects both parties similarly and, therefore, can be dismissed from consideration by the court.

With reference, however, to the other allegations in the petition, it is apparent that the ability of the husband "to contribute" has increased appreciably, for his net income has approximately doubled since the date of the original decree. Moreover, there is some controverted evidence in the record concerning his half ownership of the building where his store is now located, title being held in the name of his present wife.

At the same time the evidence tends to indicate that the needs of the petitioner have definitely increased since the entry of the decree. She is now required to pay under the new tax amendment an income tax of \$117 on an annual income of \$1040, whereas respondents income tax is correspondingly reduced over \$200.00 annually.

Admittedly the mere fact that the statute shifts the payment of the tax does not in itself constitute a justification for increasing the alimony payments. The inquiry in each case must be whether the payment of the tax reduces the wife's income beyond what is necessary for her station in life. *Russell v. Russell*, 142 F. (2d) 753, 754. *Jacobs v. Jacobs*, 328 Ill. App. 133; *Kraunz v. Kraunz*, 293 N.Y. 152.

This issue was passed upon for the first time by the Illinois courts in the *Jacobs* case, *supra*, where the court held that the alimony payments should be increased on the ground that the amendment of the income tax statute resulted in a substantial reduction in the balance remaining in the hands of the petitioner after the payment of the income tax. The court stated at p. 142:

"We think any decrease in the wife's income, whether due to the payment of income taxes or to any other reason

certain actual expenses. Finally, reference is made to the amount of living allowance the purchasing power of \$20.00 is thereby reduced. The latter circumstance does not constitute a material factor inasmuch as it affects both parties alike, and, therefore, can be disregarded from consideration by the court.

With reference, now, to the ability of the petitioner, it is noted that the ability of the husband to contribute has increased considerably, for the net income has approximately doubled since the date of the original decree. Moreover, there is some controversy existing as to the right concerning the half ownership of the building where his wife is now located, title being held in the name of his present wife. At the same time the wife is unable to find work that meets the needs of the petitioner have definitely increased since the date of the decree. She is now required to pay under the new tax enactment an income tax of \$114 or an actual increase of \$104, whereas respondent's income tax is correspondingly increased over \$200.00 annually.

Altogether the mere fact that the statute shifts the payment of the tax does not in itself constitute a justification for increasing the amount of the income tax. The inquiry in such cases must be whether the payment of the tax places too great a burden upon the taxpayer for her station in life. *Husarek v. Husarek*, 144 F. (2d) 757, 758, 300 U.S. 111. *And*, *Wright v. Wright*, 144 F. (2d) 101.

The issue was placed upon for the first time by the 11th Circuit in the *Jacobson* case, where the court held that the amount of the income tax should be increased on the ground that the amount of the income tax should be increased in a substantial proportion in the balance of the income tax. The court stated as follows:

"It is true that in the *Jacobson* case, where the issue of income tax was raised by other reasons

which reduces her income beyond what is necessary for her station in life may be considered." (Citing Russell v. Russell, 142 F. (2d) 753.)

It is the opinion of the court that in the case at bar the payment of \$117 for income taxes constitutes a financial strain on the petitioner, whose total income is only \$1040 annually. This strain is aggravated by the fact that since the mortgage has been paid off the petitioner is now required to pay the general taxes on the homestead, amounting to approximately \$100 per year. The payment of this tax, together with the income tax, affects a substantial reduction in the support received by the petitioner at the present time, of which this court should take cognizance.

In Kraunz v. Kaunz, 293 N.Y. 152, 156, when the court increased the alimony allowed the wife because of an increase in the amount of taxes she had to pay, it was stated:

"In fixing the alimony to be paid by a defendant . . . the court would certainly take into account the income and other taxes which the wife and husband would probably be compelled to pay. . . . No public policy embodied in the tax statutes is thwarted by the court when they direct a defendant in a matrimonial action to pay to his wife for her support. . . a sum commensurate with his financial ability to pay and sufficient to furnish proper support after taxes are paid."

Under the foregoing facts and circumstances, tested by the criterion set forth by the Supreme Court in the Smith case, supra, relied upon by the respondent, i.e., that there must be a change in the need of the wife and in the ability of the husband to contribute, it is the considered judgment of this court that some increase in the amount of alimony payable to the petitioner is warranted in the instant case. Therefore, the judgment of the circuit court denying the petition for an increase in alimony and a modification of the terms of the original decree was in error and should be reversed and remanded so that some additional allowance of alimony may be made as shall appear to the court to be reasonable and proper under all the circumstances.

In accordance with the prayer in the petition, petitioner is entitled to reasonable attorney fees necessarily incurred

which reduces her income beyond what is necessary for her
sustenance in life may be considered." (Citing *Massell v.*
Massell, 142 F. 2d 757.)

It is the opinion of the court that in the case at bar the

payment of \$17.50 for income taxes constitutes a financial burden

on the petitioner, whose total income is only \$1000 annually.

This again is supported by the fact that since the payment

has been paid off the petitioner is now relieved to pay the

general tax on the proceeds, amounting to \$1000 annually.

The payment of this tax, together with the

income tax, affords a substantial relief in the end of the

year by the petitioner of the present tax, of which this court

should take cognizance.

In *Knickerbocker v. Knickerbocker*, 102 F. 2d 101, 102, where the court

ordered the alimony allowed the wife because of an increase

in the amount of taxes she had to pay, it was stated:

"In fixing the alimony to be paid by a husband to his
wife, the court should take into account the income and other
taxes which the wife and husband would probably be compelled to
pay. . . . No public policy embodied in the tax statutes is violated
by the court when they direct a husband to pay a substantial amount
to pay to his wife for her support. . . . a husband's obligation
to pay to his wife and children to furnish support
and after taxes are paid."

Under the foregoing facts and circumstances, stated by the

petitioner set forth by the Supreme Court in the *Butler* case,

above, relief upon by the respondent, i.e., that there must be

a change in the need of the wife and in the ability of the hus-

band to contribute, it is the considered judgment of this court

that some increase in the amount of alimony payable to the peti-

tioner is warranted in the instant case. Therefore, the judg-

ment of the circuit court denying the petition for an increase

in alimony and a modification of the terms of the original

decree was in error and should be reversed and remanded so that

some additional allowance of alimony may be made as shall be

to the court to be reasonable and proper under all the circum-

stances.

In accordance with the prayer in the petition, petitioner

is entitled to reasonable attorney fees necessarily incurred

by her in this proceeding.

REVERSED AND REMANDED WITH DIRECTION

by her in this proceeding.

RECEIVED AND RETURNED TO THE ASSOCIATION

*Approved
J. H. B.*

Abstract

Gen. No. 10083

AGENDA NO. 5

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT
MAY TERM, A. D. 1946

235.3

THE WAUKEGAN TIMES THEATRE
CORPORATION, A CORPORATION,
PLAINTIFF-APPELLANT,

V.

NELLIE CONRAD, AND WESTERN AND
SOUTHERN LIFE INSURANCE COMPANY,
A CORPORATION,

DEFENDANTS-APPELLEES.

329 I.A. 643²

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY

Mr. Justice Dove delivered the opinion of the court:

This is an appeal from a decree allowing interest on a disputed fuel oil bill. Appellant filed a complaint against appellees in the circuit court of Lake County for an injunction restraining the prosecution of a forcible entry and detainer suit theretofore instituted by Nellie Conrad, or the prosecution of any other action for possession of the premises involved. Nellie Conrad filed an answer, and a counterclaim alleging, among other things, money due for fuel oil, under the ninth paragraph of the lease. The theatre company's answer thereto prayed for a construction of the ninth paragraph, and denied it was indebted to the defendants as alleged in the counterclaim.

The ninth paragraph of the lease reads as follows:

"Lessor shall furnish to lessee in the radiators in said demised premises, a reasonable amount of hot water heat or steam heat at reasonable hours if the weather and temperature require it,

[Handwritten signature]

Abstract

AGENDA NO. 2

Gen. No. 10033

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

MAY TERM, A. D. 1946
SECOND DISTRICT

3231.A.643

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY

THE WASHINGTON TIMES THEATRE
CORPORATION, A CORPORATION,
PLAINTIFF-APPELLANT,

V.

HELLIE CONRAD, AND WESTERN AND
SOUTHERN LIFE INSURANCE COMPANY,
A CORPORATION,

DEFENDANTS-APPELLEES.

Mr. Justice Love delivered the opinion of the court:

This is an appeal from a decree allowing interest on a
disputed fuel oil bill. Appellant filed a complaint against ap-
pellees in the circuit court of Lake County for an injunction
restraining the prosecution of a forcible entry and detainer suit
therefore instituted by Nellie Conrad, or the prosecution of any
other action for possession of the premises involved. Nellie Con-
rad filed an answer, and a counterclaim alleging, among other
things, money due for fuel oil, under the ninth paragraph of the
lease. The theatre company's answer thereto prayed for a con-
struction of the ninth paragraph, and denied it was indebted to
the defendants as alleged in the counterclaim.

The ninth paragraph of the lease reads as follows:

"Lessor shall furnish to lessee in the radiators in said
demised premises, a reasonable amount of hot water heat or steam
heat at reasonable hours if the weather and temperature require it,

for the use of lessee.***** Lessee shall pay one half the cost of the fuel furnished to the heating plant used to heat said premises, it being specifically understood that said heating plant heats, in addition to the premises herein demised, the so-called "Pantheon Building" located at 38 S. Genesee Street, Waukegan, Illinois, consisting of stores, apartments and offices."

The trial court entered a decree holding the lease to be in effect between the parties, and dismissed the counterclaim for want of equity, except that part thereof pertaining to the amount claimed to be due Nellie Conrad for fuel oil, and construed the ninth paragraph of the lease as meaning that the lessee is liable for and should pay one half the cost of the fuel furnished to heat the demised premises only, and is not liable to pay for any portion of the fuel furnished to supply heat or hot water to the so-called "Pantheon Building," or any other building except the theatre premises. Upon an appeal to this court (324 Ill. App. 622) we affirmed the decree in all respects except the holding as to the amount of fuel oil for which the theatre company is liable, held that it is liable for one half the bills rendered for all the oil used in the heating plant, and reversed that part of the decree and remanded the cause with directions to modify it in this respect in accordance with the views expressed in the opinion. Other facts, not important here, appear in the opinion.

Upon the remanding order being filed, the decree was modified, requiring the counterclaimants to file their account of the fuel oil used to heat the premises, showing in detail the dates, quantities, and amounts paid for such fuel oil and all payments made for or on behalf of plaintiff (appellant) on account thereof, together with credit for interest on the \$5000 deposited with the lessor as security on the lease, and which, by the terms thereof,

for the use of Lessee.**** Lessee shall pay one half the

cost of the fuel furnished to the heating plant used to heat said premises, it being specifically understood that said heating plant heats, in addition to the premises herein demised, the so-called "Panthron Building" located at 38 S. Genesee Street,

Waukegan, Illinois, consisting of stores, apartments and offices. The trial court entered a decree holding the lease to be

in effect between the parties, and dismissed the counterclaim for want of equity, except that part thereof pertaining to the amount

claimed to be due Nellie Gurnea for fuel oil, and construed the

ninth paragraph of the lease as meaning that the Lessee is liable

for and should pay one half the cost of the fuel furnished to heat

the demised premises only, and is not liable to pay for any portion

of the fuel furnished to supply heat or hot water to the so-called

"Panthron Building," or any other building except the theatre prem-

ises. Upon an appeal to this court (see Ill. App. 822), we affirmed

the decree in all respects except the holding as to the amount of

fuel oil furnished the theatre company is liable, held that it is

liable for one half the oil rendered for all the oil used in the

heating plant, and reversed that part of the decree and remanded the

cause with directions to modify it in this respect in accordance

with the views expressed in the opinion. Other facts, not important

here, appear in the opinion.

Upon the remaining order being filed, the decree was modified,

requiring the counterclaimants to file their account of the

fuel oil used to heat the premises, showing in detail the dates,

quantities, and amounts paid for each fuel oil and all payments made

for or on behalf of defendant (appellant) on account thereof, to-

gether with credit for interest on the \$5000 deposited with the

lessor as security on the lease, and which, by the terms thereof,

bore interest at 6% per annum. Nellie Conrad filed an account, and included therein interest on the fuel oil bills, computed at 6% per annum on the unpaid balances. Appellant filed objections to the account, on the grounds that it did not comply with the order of the trial court, in that it included interest; that no interest was sought to be recovered by the counterclaim, and no mention of interest was made by the counterclaimant in her offer of proofs before the master; that there is no legal liability for interest on a disputed claim and the claim involved was disputed; and that this court made no mention of interest on the fuel account in the opinion. The trial court overruled the objections to the account, and entered a decree finding that on March 1, 1945, there was due Nellie Conrad under the account filed, with interest computed at 5% per annum, the sum of \$2882.34 for oil purchased and unpaid for under the terms of the lease as construed by this court, and that on said date there was due appellant the \$5000 deposited as security, after having given appellant credit for all interest thereon at 6% per annum up to that time, leaving a net balance of \$2117.86 due appellant, and ordering Nellie Conrad to pay the same within 30 days, with interest thereon at 6% per annum from March 1, 1945 to the date of the decree. This appeal is prosecuted by the theatre company.

The mandate of this court on the former appeal directs the trial court to modify the decree "in accordance with the views expressed in the opinion filed herein." Appellee's contention that the instant appeal should be dismissed because neither the abstract nor the record contains such opinion, has no merit. On a second appeal, this court takes judicial notice of its own record and the opinion rendered on a prior appeal between the same parties and involving the same subject matter. (Jackson v. Glos, 249 Ill. 388,

some interest at 6% per annum. Nellie Conrad filed an account, and included therein interest on the fuel oil bills, computed at 6% per annum on the unpaid balances. Appellant filed objections to the account, on the grounds that it did not comply with the order of the trial court, in that it included interest; that no interest was sought to be recovered by the counterclaim, and no mention of interest was made by the counterclaimant in her offer of proofs before the master; that there is no legal liability for interest on a disputed claim and the claim involved was disputed; and that this court made no mention of interest on the trial account in the opinion. The trial court overruled the objections to the account, and entered a decree finding that on March 1, 1945, there was due Nellie Conrad under the account filed, with interest computed at 6% per annum, the sum of \$2885.34 for oil purchased and unpaid for under the terms of the lease as confirmed by this court, and that on said date there was due appellant the \$5000 deposited as security, after having given appellant credit for all interest thereon at 6% per annum up to that time, leaving a net balance of \$2117.86 due appellant, and ordering Nellie Conrad to pay the same within 30 days, with interest thereon at 6% per annum from March 1, 1945 to the date of the decree. This appeal is prosecuted by the theatre company.

The mandate of this court on the former appeal directs the trial court to modify the decree "in accordance with the views expressed in the opinion filed herein." Appellee's contention that the instant appeal should be dismissed because neither the abstract nor the record contains such opinion, has no merit. On a second appeal, this court takes judicial notice of its own record and the opinion rendered on a prior appeal between the same parties and involving the same subject matter. (Jackson v. Glose, 249 Ill. 383, 98 Ill. 383.)

392; 23 C. J. Evidence, ^{Page 110-111,} ~~Dec 119, 122~~ Cases cited by appellee, not involving the same cause, the same parties, or the same court, are not in point.

Appellant urges here the same objections to the account which he raised in the trial court. Appellees rely upon that portion of section 2 of the Interest act, (Ill. Rev. Stat. 1945, chap. 74, par. 2), which provides for interest at 5% per annum on all moneys after they become due on any instrument of writing. It is not claimed that interest was due under any of the other provisions of that section.

On the former appeal we noted that appellant took over the lease on May 4, 1937 and that on September 20, 1937, appellant's president wrote appellee's agent agreeing to pay its predecessors' unpaid ^{fuel} ~~fuel~~ oil bills amounting to \$1591.32, by paying \$91.32 that day and \$100 per month thereafter, and reduced that bill to \$1000; and that appellee's agent testified that the amount due for oil at the time he testified was \$1988.65, allowing a credit of \$400 for interest on the \$5000 advance by the lessee under the terms of the lease, and that credit was given annually for such interest against the amount due for oil.

The lease provides for interest on the \$5000 deposit, but does not provide for any interest on unpaid fuel oil bills. From December 27, 1934, the date of the lease, up to the time that the counterclaimant filed her account in response to the order of the trial court after the cause was remanded, no interest on any unpaid fuel oil bill was ever claimed, so far as the record shows, but the parties treated the contract as requiring the lessee to pay only one half the cost of the fuel oil, without interest, and even though there were delays in making such payments no interest was ever claimed from the lessee or from appellant. It is a familiar rule that

Exhibit 10-11

382; 23 C. J. Evidence, 111. Cases cited by appellee,

not involving the same cause, the same parties, or the same court,

are not in point.

Appellant urges here the same objections to the account

which he raised in the first court. Appellants rely upon the provisions

of section 2 of the Interest act, (Ill. Rev. Stat. 1945, chap.

74, par. 2), which provides for interest at 5% per annum on all money

after they become due on any instrument of writing. It is not claimed

that interest was due under any of the other provisions of that

section.

On the former appeal we noted that appellant took over the

lease on May 4, 1937 and that on September 30, 1937, appellant's

president wrote appellee's agent agreeing to pay its predecessor's

unpaid fuel oil bills amounting to \$181.38, by paying \$51.38 that

day and \$130 per month thereafter, and noting that \$110.00

and that appellee's agent testified that the amount due for oil at

the time he testified was \$183.85, allowing a credit of \$400 for

interest on the \$5000 advanced by the lessee under the terms of the

lease, and that credit was given annually for such interest against

the amount due for oil.

The lease provided for interest on the \$5000 deposit, but

does not provide for any interest on unpaid fuel oil bills. From

December 27, 1934, the date of the lease, up to the time that the

counterclaimant filed her account in response to the order of the

trial court the contract was amended, no interest on any unpaid

fuel oil bill was ever claimed, so far as the record shows, but the

parties treated the contract as requiring the lessee to pay only

one half the cost of the fuel oil, without interest, and even though

there were delays in making such payments no interest was ever claimed

from the lessee or from appellant. It is a familiar rule that

courts will give great weight to a construction of a contract placed upon it by the parties themselves and by their ^{acts} ~~note~~ or failure to act in connection with it. (Lehmann v. Revell, 354 Ill. 262, 281.).

The counterclaim did not allege that any interest was owing by appellant on unpaid fuel oil bills, and the testimony of the counterclaimant's own witness discloses that no claim against appellant for interest was urged or contemplated in the trial court. No such claim was made in this court on the former appeal, such interest was not mentioned in the opinion or mandate of this court, or in the modifying order of the trial court, but the cause was tried, appealed, reversed and remanded on a claim for one half the fuel oil bills without interest.

Piecemeal litigation is not permitted and neither the parties nor the court may be twice vexed with the same cause of action. (Skolnik v. Petella, 376 Ill. 500, 507; Travelers Ins. Co. v. Mayo, 170 id. 498, 502; ~~Reilly, 613 Ill. App. 354~~). Recovery for part of an entire demand will bar an action for the remainder, if the remainder was due when the first action was commenced. (Dulaney v. Payne, 101 Ill. 325; Abbott v. Brown, 131 id. 108; Jackson v. Glos, supra). Although it has been held, as urged by appellee, where interest is payable under a statute, it is not necessary to specify interest in the declaration, (Haley v. Supreme Court of Honor, 139 Ill. App. 478; ^W~~W~~arner v. Independent Order of Foresters, 244 id. 211), that doctrine does not militate against the principle that a cause of action cannot be split and piecemeal litigation is not permissible. The trial court erred in allowing interest on the unpaid fuel oil bills.

The decree entered on November 10, 1945, gives the counterclaimant 30 days in which to make payment, with interest on the amount of it at 6% per annum from March 1, 1945 to the date of the

courts will give great weight to a consideration of a contract placed upon it by the parties themselves and by their ~~action~~ failure to act in connection with it. (Lehmann v. Ravello, 284 Ill. 382, 381.)

The counter claim did not allege that any interest was owing by appellant on unpaid fuel oil bills, and the testimony of the counterclaimant's own witness discloses that no claim against appellant for interest was urged or contemplated in the trial court. No such claim was made in this court on the former appeal, such interest was not mentioned in the opinion or mandate of this court, or in the modifying order of the trial court, but the cases was tried, appealed, reversed and remanded on a claim for one half the fuel oil bills without interest.

Piecemeal litigation is not permitted and neither the parties nor the court may be twined with the same cause of action (Skolnik v. Petrella, 375 Ill. 500, 507; Travelers Ins. Co. v. Mayo, 170 Ill. 498, 502; ~~Travelers Ins. Co. v. Mayo~~). Recovery for part of an entire demand will bar an action for the remainder, if the remainder was due when the first action was commenced. (Lane v. Payne, 101 Ill. 325; Abbott v. Brown, 131 Ill. 108; Jackson v. Glaz, supra). Although it has been held, as urged by appellee, where interest is payable under a statute, it is not necessary to specify interest in the declaration. (Haley v. Supreme Court of Honor, 133 Ill. App. 478; ~~Business v. Independent Order of Foresters~~ 214 Ill. 211), that doctrine does not militate against the principle that a cause of action cannot be split and piecemeal litigation is not permissible. The trial court erred in allowing interest on the unpaid fuel oil bills.

The decree entered on November 10, 1943, gives the counterclaimant 30 days in which to make payment, with interest on the amount of it at 6% per annum from March 1, 1943 to the date of the

decree. This is not granting a thirty days' interest free period, as claimed by appellant, but under the statute, (Ill. Rev. Stat. 1945, chap. 74, par. 3), the decree draws interest at 5% per annum from its date until paid, which covers the thirty day period mentioned.

Appellant claims that the account filed by the counterclaimant shows that one half of the fuel oil bills amounts to \$4767.55; that after crediting the cash payments made thereon and the interest credited on the \$5000 deposit, as shown by the account, the balance is \$1726.35, and, deducting this balance from the \$5000 deposit leaves \$3273.77 due appellant from the counterclaimant on March 1, 1945. The correctness of this computation, excluding the item of interest on unpaid ^{fuel} ~~fuel~~ oil bills, improperly charged in the account filed by the counterclaimant, is not disputed by her.

That portion of the modified decree relating to interest on the unpaid fuel oil bills and the amount found due to appellant from the counterclaimant, is reversed, and the cause is remanded with directions to modify the same to conform to the views herein expressed, by excluding any interest on the unpaid fuel oil bills. In all other respects the modified decree is affirmed.

Reversed in part and remanded with directions.

decree. This is not granting a thirty days' interest free period, as claimed by appellant, but under the statute, (Ill. Rev. Stat. 1945, ch. 74, par. 5), the decree draws interest at 5% per annum from its date until paid, which covers the thirty day period mentioned.

Appellant claims that the account filed by the counter-

claimant shows that one half of the final bill amounts to

\$4787.38; that after crediting the cash payments made thereon and

the interest credited on the \$3000 deposit, as shown by the account,

the balance is \$1780.38, and, deducting this balance from the \$3000

deposit leaves \$327.77 due appellant from the counterclaimant on

March 1, 1943. The counterclaimant of this computation, excluding the

item of interest on unpaid bill, improperly charged in

the account filed by the counterclaimant, as not disputed by her.

The court's opinion of the modified decree relating to interest on

the unpaid final bill and the amount found due to appellant from

the counterclaimant, is reversed, and the cause is remanded with

directions to notify the parties to conform to the views herein expressed.

In all other respects the modified decree is affirmed.

Reversed in part and remanded with directions.

Abstract

GEN. NO. 10090

AGENDA NO. 8

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT
May Term, A. D. 1946

FRANKLIN F. WINGARD, AS
ADMINISTRATOR OF THE ESTATE
OF ANNA PETERS, DECEASED,
PETITIONER-APPELLEE,

v.

W. F. PETERS, ET AL.,
DEFENDANTS.

W. F. PETERS,
DEFENDANT-APPELLEE,

v.

MAYME LINDBURG AND HARRY L.
LINDBURG,
DEFENDANTS-APPELLANTS.

2363
329 I.A. 644'

APPEAL FROM THE
PROBATE COURT OF
ROCK ISLAND COUNTY

Dove, J.

This is an appeal by Mayme Lindburg, one of the children and heirs at law of Anna Peters, deceased, and Harry L. Lindburg, her husband from a decree of the probate court of Rock Island County, ordering a sale of the decedent's real estate to pay debts and costs of administration.

The record discloses that on April 8, 1943, W. F. Peters, a son of the decedent, filed two claims against his mother's estate. One of them was for \$962.40 on an open account and was allowed in the sum of \$293.70. The other claim was for \$10,799.72 and was based upon a promissory note to the claimant, executed by his parents, Gust R. Peters and

Abstract

ABSTRACT NO. 2

GEN. NO. 10000

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

RECORDS CLERK
May Term, A. D. 1946

8281.A.014

APPEAL FROM THE
PROBATE COURT OF
ROCK ISLAND COUNTY

WILLIAM F. WILKARD, AS
ADMINISTRATOR OF THE ESTATE
OF ANNA PETERS, DECEASED,
PETITIONER-APPELLANT,

v.

W. F. PETERS, JR. AND
DAUGHTERS,

W. F. PETERS,
DEFENDANT-APPELLEE,

v.

MAIRIE LINDBERG AND MARCEL L.
LINDBERG,
DEFENDANTS-APPELLEES.

Dove, J.

This is an appeal by Mairie Lindberg, one of the children and heirs at law of Anna Peters, deceased, and Harry L. Lindberg, her husband from a decree of the probate court of Rock Island County, ordering a sale of the decedent's real estate to pay debts and costs of administration. The record discloses that on April 8, 1943, W. F. Peters, a son of the decedent, filed two claims against his mother's estate. One of them was for \$682.40 on an open account and was allowed in the sum of \$303.70. The other claim was for \$10,789.72 and was based upon a promissory note to the estate, executed by his parents, Gust R. Peters and

Anna Peters. This note was for the principal sum of \$4930.00 and was dated September 1, 1922, with no maturity date stated therein, the space therefor having been left blank. The note recited that it bore interest at 6% per annum, but the time from which the interest was to run was also left blank. Gust R. Peters made a payment of \$158.00 on the note on November 6, 1936.

On September 24, 1945, the administrator filed a statement of the condition of the estate, and a petition to sell real estate to pay debts, alleging personal assets of \$100.00 consisting of household furniture, and a deficit of \$12,193.42. Appellants filed an answer and a counterclaim, alleging the claims were respectively barred by the five years and the ten years Statutes of Limitations. On the trial, the court set aside the judgment for \$293.70 on the first claim mentioned, as barred by the five years Statute of Limitations, of which no complaint is made by appellee, and that claim will not be further considered. The decree found that the deficit, as nearly as could be ascertained, was \$12,224.72, in addition to expenses of administration, estimated at \$1200.00 and ordered a sale of the real estate to pay the same.

There being no maturity date stated in the note, it was a demand note, (Ill. Rev. Stat. 1945, chap. 98, par. 27), and the Statute of Limitations began to run from the date of the note. (Ade v. Ade, 181 Ill. App. 577; Estate of Chapman, 248 Ill. App. 12). It is also well settled that a payment by one joint debtor without the knowledge or assent, or subsequent ratification by the other, will not operate to bind such other joint debtor. (Boynton v. Spafford, 162 Ill. 113, 115; Kallenbach v. Dickinson, 100 Ill. 427).

In an effort to overcome the applicability of

Anna Hester. This note was for the principal and

\$400.00 and was dated September 1, 1901, with an interest

date stated therein, the same showing having been left blank.

The note recited that it was issued at 6% per annum, but

the time when the interest was to run was also left

blank. Great R. Parker made a payment of \$25.00 on the note

on November 6, 1901.

On September 27, 1901, the defendant executed a

statement of the condition of the estate, and a petition to

sell real estate to pay debts, alleging personal assets of

\$100.00 consisting of household furniture, and a deficit of

\$10,122.41. Appellants filed an answer and a counterclaim,

alleging the claims were respectively barred by the five

years and ten years statutes of limitation. On the

trial, the court set aside the judgment for \$10,170 on the

first claim mentioned, as barred by the five years statute of

limitations, of which no claim is made by appellants, and

that claim will not be further considered. The answer found

that the deficit, as nearly as could be ascertained, was

\$12,224.72, in addition to expenses of administration,

estimated at \$100.00 and ordered a sale of the real estate

to pay the same.

There being no monetary claim stated in the note, it

was a general note, (117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127)

and the statute of limitations would be run from the date of

the note. (128 v. 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

was a joint debtors with the mortgage on account, or any

payment thereon by the estate, will not operate to bind

such estate. (128 v. 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

125; Kellenbach v. Kellenbach, 100 Ill. 427.

In an effort to overcome the applicability of

this doctrine and the running of the Statute of Limitations, appellees rely upon the testimony of Grace Peters Anderson, another daughter of the decedent. She testified that a short time before her parents went to live with the Lindburgs in February, 1939, she asked her mother, in the presence of her father, if they had ever paid anything back on Will's (appellee's) loan or his note, and that her mother said: "Yes, a little." On cross-examination she testified that the note represented money loaned by her brother William, (appellee), for the purpose of improving property, and that "The money was loaned in April sometime, along in 1936 or 1937, possibly:" and that "It was that money that they spoke to me as owing to my brother on his note." Appellee's ledger sheet shows a loan to his father on March 31, 1936, of \$342.00 for advancement to pay a bill of Moline Heating and Construction Company, which indicates that this was the loan referred to in the conversation between the witness and her mother. However, even if she had testified that her mother spoke of a payment on the \$4930.00 note, the statement by Anna Peters was not of such a character as to toll the Statute of Limitations as to her. To take a case out of the statute, there must be either an express promise, or a conditional promise, with performance of the condition, or such an unconditional admission of the justice of the debt as fairly to imply an intention and promise to pay it. (Norton v. Colby, 52 Ill. 198, 202; Parsons v. Northern Illinois Coal and Iron Co., 38 Ill. 430). There must be such circumstances as reasonably authorize an inference of an intention to waive the bar of the statute. There must be affirmative action or conduct designed to prospectively affect the rights of the parties to the prior contract. (Kallenbach v. Dickinson, 100 Ill. 427, 435.) Nothing said by Anna Peters to the witness can be interpreted as a ratification by her

[illegible]

of the payment of \$158.00 on the note of 1922. At most it could be nothing more than an admission that the payment had been made. Moreover, if the witness had a pecuniary interest in the note, as suggested by appellant, her testimony was incompetent under section 2 of the Evidence Act, (Ill. Rev. Stat. 1945, chap. 51, par. 2); and if she did not have any such pecuniary interest in the note, as claimed by appellees, whatever Anna Peters may have said to her, even if she had promised to pay the note, would be ineffectual to remove the bar of the statute, because a debtor's acknowledgment or promise to one, not interested or authorized to speak for another, will not avoid the statute. (Carroll v. Forsythe, 69 Ill. 127; Keener v. Crull, 19 Ill. 189; Wachter v. Albee, 80 Ill. 47), and there is no testimony tending to show that the witness represented or was authorized to act or speak for her brother, the claimant. Furthermore, it was stipulated that the assessor's records for 1942 do not show any return by the claimant of any note or credit held by him.

Under the circumstances shown by the record, the Statute of Limitations had run against the \$4930.00 note on September 1, 1932, as to Anna Peters, and there is no competent or relevant evidence in the record that tends to show that as to her, the bar of the statute was ever removed. Appellee's other claim of \$293.70 was set aside, and the petition to sell real estate alleges that no claim other than those two have been or will be allowed against the estate. There is no proof that any cost of administration was due and unpaid, and since the record shows no allowable claim against the estate, there is no basis for any sale of real estate to pay debts. Nor is there any showing that the personal property on hand is not sufficient to pay the costs of administration other than the costs allocable to these two claims.

of the payment of \$158.00 on the note of 1925. At least it
would be difficult more than an admission that the payment had
been made. However, if the witness had a personal knowledge
in the note, as suggested by applicant, her testimony was
inconsistent with Section 2 of the Evidence Act, (Ill. Rev.
Stats. 1907, Chap. 110, Sec. 2); and if she did not have any
such personal knowledge in the note, as obtained by evidence,
whether or not she had been told to pay, even if she had
promised to pay the note, would be insufficient to remove the
burden of the statute, because a debtor's acknowledgment or
promise to pay, not intended or authorized to operate for
another, will not avoid the statute. (Gardner v. Gardner,
80 Ill. 127; Kohn v. Smith, 10 Ill. 120; Kohn v. Smith,
80 Ill. 127), and there is no testimony tending to show that
the witness represented or was authorized to act or speak for
her brother, the defendant. Furthermore, it was stipulated
that the witness's records for 1925 do not show any return
by the claimant of any note or credit paid by him.
Under the circumstances shown by the record, the
absence of admission and the absence of the \$158.00 note on
September 1, 1925, as to these facts, and there is no competent
or relevant evidence in the record that tends to show that he
to her, the bar of the statute was ever removed. Applicant's
other claim of \$158.00 was not made, and the position as
well as estate alleged that he did not know that there was
have been or will be alleged against the estate. There is
no proof that any part of administration was the and unpaid,
and since the record shows no admission of claim against the
estate, there is no basis for any claim of real estate in the
estate. Nor is there any showing that the personal property
on hand is not sufficient to pay the costs of administration
other than the costs all people to these two claims.

The decree is reversed and the cause is remanded to the probate court with directions to set aside the judgment for \$10,779.72 entered on April 8, 1943, on the note for \$4930.00 and to dismiss the petition for leave to sell the decedent's real estate to pay debts.

Reversed and remanded with directions.

The money is received and the cause is referred to
the police court with directions to set aside the judgment for
\$10,770.75 entered on April 8, 1943, on the note for \$1350.00
and to allow the petition for leave to sell the defendant's
real estate to stay.

Reversed and remanded with directions.

Abstract

Gen. No. 10078

Agenda No. 2

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT
May Term, A.D. 1946.

2373
329 I.A. 644²

DONALD C. ALLENSWORTH,
PLAINTIFF-APPELLANT,

v.

MARY WEINBERG, ET AL.
DEFENDANTS-APPELLEES.

APPEAL FROM THE
CIRCUIT COURT OF
KNOX COUNTY

Per Curiam:

Appellant, Donald C. Allensworth, was a defendant as a mechanic's lien claimant, in a suit in the circuit court of Knox County for the partition of certain premises, known as the Plaza Theater, in the City of Galesburg. He also claimed the right to have a deed executed by two of the parties to him for an undivided one-half of the premises.

The record discloses that appellant had entered into a contract with the owners of an undivided one-half of the said Plaza Theater property for the purchase of their interest on or before March 1, 1939, for \$7500 in cash, or by way of a first mortgage on all the interests in the premises. A. L. Weinberg owned the other undivided half, and had entered into a joint venture with appellant, with a view of remodeling the premises and making a profit. Allensworth contributed time, labor and some money and Weinberg advanced about \$14,000. Weinberg agreed that if appellant purchased the other undivided half of the premises for \$7500 that then he, Weinberg, would, upon the completion of

Abstract

Abstract No. 2

Dec. No. 10078

IN THE SUPREME COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT
May Term, A.D. 1936.

APPEAL FROM THE
CIRCUIT COURT OF
KNOX COUNTY

DONALD G. ALLENBORTH,
PLAINTIFF-APPPELLANT,

v.

MARY WEINBERG, ET AL.,
DEFENDANT-APPELLEE.

Per Curiam:

Appellant, Donald G. Allenborth, was a defendant as a mechanic's lien claimant, in a suit in the circuit court of Knox County for the partition of certain premises, known as the Plaza Theater, in the City of Galesburg. He also claimed the right to have a deed executed by two of the parties to him for an undivided one-half of the premises.

The record discloses that appellant had entered into a contract with the owners of an undivided one-half of the said Plaza Theater property for the purchase of their interest on or before March 1, 1936, for \$500 in cash, or by way of a first mortgage on all the interests in the premises. A. L. Weinberg owned the other undivided half, and had entered into a joint venture with appellant, with a view of remodeling the premises and making a profit. Allenborth contributed time, labor and some money and Weinberg advanced about \$14,000. Weinberg agreed that if appellant purchased the other undivided half of the premises for \$500 less than he, Weinberg would, upon the completion of

the remodeled building sign the mortgage covering the entire real estate, and allow the returns from the remodeled building to pay off the mortgage. The master found that the venture had proved disastrous; that appellant did not complete his contract with Weinberg, nor his contract of purchase for an undivided half of the premises, and that the value of the premises was less when the work of remodeling was discontinued than when it was begun. The master's report was approved, the decree finding against appellant's claims was approved by this court, (Weinberg v. Jenkins, 323 Ill. App. 363), and the Supreme Court denied appellant's petition for leave to appeal. After the mandate from this court was filed in the circuit court, appellant filed in that court a "petition and complaint in the nature of a bill of review," on the alleged grounds of newly discovered evidence, fraud in procuring the decree, and errors apparent on the face of the record. The complaint was stricken on motion of appellees, the cause was dismissed for want of equity, and this appeal followed.

Appellant also filed in the circuit court a petition for leave to file a complaint in a quo warranto action against Honorable Riley E. Stevens, presiding judge of the circuit court in the partition proceeding, and numerous other persons, including the master in chancery, two banks, and several professional and business men, charging them with fraud, perjury and other offenses in connection with the partition suit and also in other matters. The prayer of the petition was denied in the trial court and this court dismissed the appeal. See *People of the State of Illinois ex rel Donald G. Allensworth v. R. E. Stevens et al*, Gen. No. 10079 in which an opinion has this day been filed.

Appellant's claim that the two proceedings mentioned were "initiated in compliance with mandate" of the Supreme Court and of this court, is wholly without merit or foundation. Nothing therein can possibly be so interpreted.

the remodeled building with the mortgage covering the entire real estate, and allow the returns from the remodeled building to pay off the mortgage. The master found that the venture had proved disastrous; that appellant did not complete his contract with Weinberg, nor his contract of purchase for an undivided half of the premises, and that the value of the premises was less when the work of remodeling was discontinued than when it was begun. The master's report was proved, the decree finding against appellant's claims was approved by this court, (Levinberg v. Weinberg, 305 Ill. App. 353), and the Supreme Court denied appellant's petition for leave to appeal. After the mandate from this court was filed in the circuit court, appellant filed in that court a "petition and complaint in the nature of a bill of review," on the alleged grounds of newly discovered evidence, fraud in procuring the decree, and errors apparent on the face of the record. The complaint was attacked on motion of appellees, the cause was dismissed for want of equity, and this appeal followed.

Appellant also filed in the circuit court a petition for leave to file a complaint in a quo warranto action against Honorable Wiley E. Stevens, presiding judge of the circuit court in this petition proceeding, and numerous other persons, including the master in chancery, two banks, and several professional and business men, charging them with fraud, perjury and other offenses in connection with the petition suit and also in other matters. The prayer of the petition was carried in the trial court and this court dismissed the appeal. See People of the State of Illinois ex rel Donald G. Allenworth v. W. E. Stevens et al, Gen. No. 10079 in which an opinion has this day been filed.

Appellant's claim that the two proceedings mentioned were "initiated in compliance with mandates" of the Supreme Court and of this court, is wholly without merit or foundation. Nothing therein can possibly be so interpreted.

A bill of review for errors apparent on the face of the record does not lie where the record sought to be reviewed has already been reviewed and the decree affirmed by an appellate tribunal. (*Hultberg v. Anderson*, 252 Ill. 607, 612; *Harrigan v. City of Peoria*, 262 Ill. 36, 42). Leave of court must be obtained before filing a bill of review for newly discovered evidence, and such leave is also necessary where the averment of newly discovered evidence is united to or accompanied by a charge of fraud in obtaining the decree. Before a bill of review can be filed for newly discovered evidence it must clearly be shown by the allegations of the bill that the new matter was discovered after the original decree was entered and could not have been discovered before by the exercise of reasonable diligence. The prayer of the petition for leave to file a bill of review for newly discovered evidence will not be granted except upon affidavit satisfying the court that the alleged new matter was not known to the petitioner and could not have been discovered and produced or used by him, by the exercise of reasonable diligence, before the entry of the decree sought to be reviewed. (*Schaefer v. Wunderle*, 154 Ill. 577, 587; *Hultberg v. Anderson*, *supra*, page 607; 3 *Encyc. of Pl. & Prac. "Bills of Review"*, pp. 587, 588). It must not be merely cumulative or of an impeaching character, and must be such as would apparently have produced a different result had it been known and brought before the court. (*Garlick v. Mutual Loan & Bldg. Ass'n. of Joliet*, 187 Ill. App. 541; *Hogg v. Eckhardt*, 267 Ill. App. 506). The so-called abstract filed in this case does not show that the bill was sworn to, or that there was any accompanying affidavit to it such as is mentioned above. This alone would bar consideration of the alleged newly discovered evidence and, furthermore, none of it is of such a character as would have produced a different result if it had been known and brought before the court.

A bill of review for errors apparent on the face of the record does not lie where the record sought to be reviewed has already been reviewed and the decree affirmed by an appellate tribunal. (Hultberg v. Anderson, 232 Ill. 607, 93 Ill. App. 2d 111, 38, 43). Leave of court must be obtained before filing a bill of review for newly discovered evidence, and such leave is also necessary where the removal of newly discovered evidence is sought to be accompanied by a charge of fraud in obtaining the decree. Before a bill of review can be filed for newly discovered evidence it must clearly be shown by the allegations of the bill that the new matter was discovered after the original decree was entered and could not have been discovered before by the exercise of reasonable diligence. The prayer of the petition for leave to file a bill of review for newly discovered evidence will not be granted except upon affidavit establishing the court that the alleged new matter was not known to the petitioner and could not have been discovered and produced or used by him, by the exercise of reasonable diligence, before the entry of the decree sought to be reviewed. (Hultberg v. Anderson, 232 Ill. 607, 93 Ill. App. 2d 111, 38, 43; Hovey v. Felt, 154 Ill. 577, 587; Hultberg v. Anderson, supra, page 607; 93 Ill. App. 2d 111, 38, 43). It must not be merely cumulative or of an impeaching character, and must be such as would apparently have produced a different result had it been known and brought before the court. (Gentile v. Mitchell, 237 Ill. App. 536). The so-called materiality in this case does not show that the bill was sworn to, or that there was any accompanying affidavit to it such as is mentioned above. This alone would bar consideration of the alleged newly discovered evidence and, furthermore, none of it is of such a character as would have produced a different result if it had been known and brought before the court.

The other ground of the bill is alleged fraud in procuring the decree. A party alleging fraud must state in his pleadings the facts relied upon to show fraud. Mere conclusions of the pleader without averments as to facts will not support an allegation of fraud. (Harrigan v. County of Peoria, supra). The portion of the bill headed "fraud in procuring decree" consists of a series of interrogatories with innuendos or implications of fraud without any statements of facts, and is thus insufficient to raise any question as to fraud. Obviously the mere labeling of that part of the bill under the quoted heading has no such effect.

Appellees have made a motion in this court to dismiss the appeal because the complaint does not set up any cause of action and shows no cause for a review of the matters already fully adjudicated in the previous action; also for the reason that the basic allegations are scurrilous, scandalous, contemptuous and impertinent. Further grounds of the motion are that the abstract does not comply with the rules of this court because it does not present clearly or concisely, the substance of the pleadings or sufficiently present the matters relied upon for reversal, and that the statement of the case in the brief is not in compliance with the rules of this court, because it is not free from argument and is without appropriate references to the abstract, and does not contain any short or clear statement of the case, and contains no propositions of law and cites no authorities.

Appellant acted as his own counsel in this and the original case, both in the circuit court and in this court. In the former case we were very lenient in allowing the appeal, and gave him every opportunity to have his case reviewed in this court, and so pointed out in the opinion. Our disposition to accord appellant an opportunity to be heard on the former appeal

The other ground of the bill is alleged fraud in procuring the decree. A party alleging fraud must state in his pleading the facts relied upon to show fraud. Mere conclusions of the pleader without averments as to facts will not support an allegation of fraud. (Harrison v. County of Tarrant, 1912). The portion of the bill headed "fraud in procuring decree" consists of a series of interrogatories with innuendoes or implications of fraud without any statements of facts, and is thus insufficient to raise any question as to fraud. Obviously the mere listing of that part of the bill under the proper heading has no such effect.

Appellants have made a motion in this court to dismiss the appeal because the complaint does not set up any cause of action and shows no cause for a review of the matters already fully adjudicated in the previous action; also for the reason that the basic allegations are conclusions, second-hand, conjectures and inferences. Further grounds of the motion are that the statement does not comply with the rules of this court because it does not present clearly or concisely, the substance of the pleading or sufficiently present the matters relied upon for reversal, and that the statement of the case in the bill is not an argument with the rules of this court, because it is not free from argument and is without appropriate reference to the facts, and does not contain any short or clear statement of the case, and contains no propositions of law and cites no authorities.

Appellant asked as his own counsel in this bill the original case, both in the circuit court and in this court. In the former case we were very lax in allowing the appeal, and gave him every opportunity to have his case reviewed in this court, and so pointed out in the opinion. Our disposition to accord appellant an opportunity to be heard on the former appeal

was not an invitation to repeat the same and other procedural errors in a subsequent appeal, or as an intimation that the established rules of this court would be waived in such a case. His complaint is an attempt to reargue the cause on the same grounds adjudicated on the former appeal. The motion of appellees to dismiss the appeal must be allowed.

As in the appeal in the original case, appellant has made charges in this case against the trial judges, lawyers, bankers, reporters and others of fraud, perjury, "subornment," and of entering into a conspiracy to defraud him of his legal rights in the cause. On the former appeal these charges were held to be groundless. Appellees made a motion in the trial court in the instant case, to have appellant punished for contempt on account of such charges. Appellant says in his brief that on the hearing of the motion the trial judge said that the matter was one for the State's attorney. This is not disputed by appellees, and the ruling, which amounted to a denial of the motion of appellees, is not questioned by cross appeal or otherwise.

Appellees have made a motion in this court designed to have appellant held in contempt of this court on account of such charges. Had the trial court held appellant to be in contempt on account of these charges, and had the ruling been properly presented here, the record would have been in shape for this court to have considered the matter. That was not done. The trial court correctly dismissed the complaint, and for the flagrant disregard of the rules of this court above mentioned, the appeal is dismissed.

Appeal dismissed.

was not an invitation to repeat the same and other procedural errors in a subsequent appeal, or as an indication that the established rules of this court would be waived in such a case. His complaint is an attempt to reverse the course of the case grounds adjudicated on the former appeal. The notion of appeals to dismiss the appeal must be allowed.

As in the appeal in the original case, appellant has made charges in this case against the trial judge, lawyers, parkers, reporters and others of fraud, perjury, "entertainment," and of entering into a conspiracy to deprive him of his legal rights in the cause. On the former appeal these charges were held to be groundless. Appellee made a motion in the trial court in the instant case, to have appellant punished for contempt on account of such charges. Appellant says in his brief that on the hearing of the motion the trial judge said that the matter was one for the State's attorney. This is not disposed by appellee, and the ruling, which amounted to a denial of the motion of appellee, is not questioned by cross appeal or otherwise.

Appellees have made a motion in this court designed to have appellant held in contempt of this court on account of such charges. Had the trial court held appellant to be in contempt on account of these charges, and had the ruling been properly presented here, the record would have been in shape for this court to have considered the matter. That was not done. The trial court correctly dismissed the complaint, and for the instant disregard of the rules of this court above mentioned, the appeal is dismissed.

Appeal dismissed.

appeal
23/3

Abstract

GEN. NO. 10079

AGENDA NO. 3

IN THE APPELLATE COURT OF THE
STATE OF ILLINOIS

SECOND DISTRICT

May Term, A.D. 1946

23/3

PEOPLE OF THE STATE OF ILLINOIS
EX REL DONALD C. ALLENSWORTH,
RELATOR-APPELLANT,

V.

E. R. STEVENS, ET AL.,
RESPONDENTS-APPELLEES.

329 I.A. 645¹

APPEAL FROM THE
CIRCUIT COURT OF
KNOX COUNTY

Per Curiam:

This is an appeal from an order denying appellant's petition for leave to file a complaint in a quo warranto proceeding, and is a companion case to Allensworth v. Weinberg, et al., Gen. no. 10078 in which the antecedent facts are set forth, and need not be repeated here. As in that case, appellant claims that this case is filed responsive to the mandate of the Supreme Court, for which claim there is no ground whatsoever. One of the grounds alleged for the appeal in the instant case is that the petition for leave to file the quo warranto complaint was denied without consideration of the bill of review in the other case, claimed to be ancillary hereto.

The respondents in the instant case are the trial judge in the companion case, the master in chancery, a former State's attorney, two banks, a newspaper, and several other attorneys, officers and citizens, alleged to constitute a "ring" for the control of the courts. It is unnecessary to detail the

charges made in the complaint but it consists of scurrilous, scandalous and impertinent charges and claims of misdemeanors and wrongs committed by the various defendants in connection with the bill of review case, Allensworth v. Weinberg, et al above referred to. It also alleges other matters entirely foreign thereto, without alleging any facts in connection therewith which would justify the granting of leave to file the complaint.

The abstract does not present, clearly or concisely, the substance of the pleadings or sufficiently present the matters relied upon for reversal ^{and is} in violation of Rule 8 of this court. The statement of the case in the brief is not free from argument and is without appropriate references to the so-called abstract, and does not contain any short or clear statement of the case, and the brief contains no proposition of law or any reference to authorities and is insufficient under Rule 9 of this court.

Appellant acted as his own counsel in all of these proceedings, and for that reason we are inclined to give him every opportunity, consistent with the law, for a hearing but we should not entirely ignore established rules of practice, and entertain an appeal in which the complaint violates the fundamental rules of pleadings and does not state a cause of action and also where the rules of procedure necessary to be observed in presenting an appeal have been entirely ignored.

The claim of appellees that appellant should be held to be in contempt of court and punished on the ground that the complaint is malicious is not shown to have been raised in the trial court, and for that reason it is not necessary to consider it here. The appeal is dismissed.

Appeal dismissed.

charges made in the complaint it consists of accusations, scandalous and imputations and claims of wrongdoings and wrongs committed by the various defendants in connection with the bill of review case, Alexander v. Weinberg, et al. above referred to. It also alleges other matters entirely foreign thereto, without alleging any facts in connection therewith which would justify the granting of leave to file the complaint.

The complaint does not present, directly or indirectly, the substance of the pleading or sufficiently present the matter relied upon for reversal ^{and in} in violation of Rule 8 of this court. The statement of the case in the brief is not free from inaccuracies and is without appropriate references to the so-called exhibits, and does not contain any point or claim sufficient of the case, and the brief contains no proposition of law or any reference to the merits and is insufficient under Rule 8 of this court.

Appellant acted as his own counsel in all of these proceedings, and for that reason we are inclined to give him every opportunity, consistent with the law, for a hearing, but we should not entirely ignore established rules of procedure, and entertain an appeal in which the complaint violates the fundamental rules of pleadings and does not state a cause of action and also where the rules of procedure necessary to be observed in presenting an appeal have been entirely ignored.

The claim of appellant that appellant should be held to be in contempt of court and punished on the ground that the complaint is malicious is not shown to have been relied in the trial court, and for that reason it is not necessary to consider it here. The appeal is dismissed.

Appeal dismissed.

A. 4

THERM-O-PROOF INSULATION MANUFACTURING)
CO., a corporation, MARSHALL DECKER)
and EDWARD STANGE.)

Appellants,)
) APPEAL FROM CIRCUIT
) COURT, COOK COUNTY.

Y.

PHILIP HOFFMAN.

Appellee.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing their complaint which sought the cancellation of 50 shares of stock held by defendant in the plaintiff corporation, and for such other relief as the court should deem just and equitable. A general reference was had to a master in chancery, who found in favor of plaintiffs and recommended a decree in conformity with his finding. However, pursuant to a hearing by the chancellor, exceptions to the master's report were sustained, and a decree was entered dismissing the complaint for want of equity, from which plaintiffs have taken an appeal.

It appears from the evidence adduced upon the hearing before the master that for some years prior to the events which gave rise to this litigation, the plaintiffs Marshall Decker and Edward Stange owned and operated the Therm-O-Proof Insulation Company, which installed insulation material in the walls of buildings. The defendant Philip Hoffman worked for this company as a helper on the installation crew for about ten years, through which he acquired experience in insulation work and skill in the manufacture of wool to be used for insulation purposes. In 1940 Decker and Stange formed the Therm-O-Proof Insulation Manufacturing Company, which will hereinafter be referred to as the corporation. Although the former company merely installed insulating material, the charter of the new corporation gave it power

45332

THE THERM-O-PROOF INSULATION MANUFACTURING
CO., a corporation,
and HOWARD STANGE,

Plaintiffs,

v.

PHILIP HOFFMAN,

Appellee.

U.S. COURT OF APPEALS

COURT, YORK COUNTY.

MR. PRESIDING JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing their com-

plaint which sought the cancellation of 50 shares of stock held by defendant in the plaintiff corporation, and for such other relief as the court should deem just and equitable. A general reference was had to a master in chancery, who found in favor of plaintiffs and recommended a decree in conformity with his finding. However, pursuant to a hearing by the chan- cellor, exceptions to the master's report were sustained, and a decree was entered dismissing the complaint for want of

equity, from which plaintiffs have taken an appeal.

It appears from the evidence adduced upon the hearing

before the master that for some years prior to the events which gave rise to this litigation, the plaintiffs Marshall Decker and Howard Stange owned and operated the Therm-O-Proof Insulation Company, which installed insulation material in the walls of buildings. The defendant Philip Hoffman worked for this company as a helper on the installation crew for about ten years, through which he acquired experience in insulation work and skill in the manufacture of wool to be used for insulation purposes. In 1940 Decker and Stange formed the Therm-O-Proof Insulation Manufacturing Company, which will hereinafter be referred to as the corporation. Although the former company merely installed insulating material, the charter of the new corporation gave it power

to manufacture as well as install such material. The individual plaintiffs paid the entire capitalization of \$5000 of the corporation, which was evidenced by 150 shares of no par value stock. Its plant was established at 147th street and Indiana avenue in the City of Dolton, Illinois.

On the date of the filing of the articles of incorporation, October 14, 1940, a contract was entered into by Decker and Stange on behalf of themselves and the corporation, and the defendant. The contract provided in substance that defendant would work for the corporation in the capacity of plant superintendent and general manager for a period of 15 years; that he was to receive \$50 per week for his services; and that in the event he should terminate the employment before the designated term, he would not enter into a similar business in any capacity directly or indirectly within a reasonable distance from the site of the plant for a period of five years. The agreement provided for the transfer of one-third (50 shares) of the corporate stock of the Therm-O-Proof Insulation Manufacturing Company to defendant. He paid no cash consideration for the stock, and in addition to his stated weekly salary, he also had an expense account from the corporation. The agreement expressly stated that were it not for the promise of defendant to enter into the employment of the corporation, plaintiffs would not have organized it; that plaintiffs had been induced to organize the corporation on the basis of the representations of defendant and to enter into the contract because of his peculiar and unique knowledge of the process of manufacturing insulation products.

On June 19, 1943 defendant, after working less than three years of the 15-year contract, left the employ of the corporation "without cause," as the master found, "and went into a

to manufacture as well as install and maintain. The in-
dividual plaintiff paid the entire capitalization of
\$2000 of the corporation, which was evidenced by 20 shares
of no par value stock. Its plant was established at 147th
street and Indiana Avenue in the City of Boston, Illinois.
On the date of the filing of the petition of incor-
poration, October 12, 1940, a contract was entered into by
Decker and trustee on behalf of themselves and the corpora-
tion, and the defendant. The contract provided in substance
that defendant would work for the corporation in the capacity
of plant superintendent and general manager for a period of
15 years; that he was to receive \$15 per week for his services;
and that in the event he should terminate his employment before
the designated term, he would not enter into a similar business
in any capacity directly or indirectly within a reasonable
distance from the site of the plant for a period of five years.
The agreement provided for the transfer of one-third (33 1/3) shares
of the corporate stock of the Insulation Manufacturing
Company to defendant. He held no cash consideration for
the stock, and in addition to his stated weekly salary, he also
had an expense account from the corporation. The agreement
expressly stated that it was for the benefit of defendant
to enter into the employment of the corporation, plaintiff
would not have organized it; that plaintiff had been induced
to organize the corporation on the basis of the representations
of defendant and to enter into the contract on a basis of his
peculiar and unique knowledge of the process of manufacturing
insulation products.
On June 19, 1943 defendant, after working less than three
years of the 15-year contract, left the employ of the corpora-
tion "without cause," as the contract provided, and went into a

line of business which is in direct competition with the business of plaintiff corporation as provided in its Charter." There is no denial of the allegation in the complaint, and the master found that a demand was made upon defendant to return the certificate of stock which he had received when the agreement was made, and he also found that "there has been a total failure of the consideration for which the 50 shares of stock in plaintiff corporation were delivered to defendant."

The principal factual question presented is whether defendant abandoned the employment of the corporation without cause. His only excuse for leaving was that plaintiffs breached paragraph 12 of the agreement which provided that all checks for the disbursement of corporate funds should be countersigned by defendant. Plaintiffs, however, introduced evidence, and the master found, that a corporate resolution was duly adopted, which was signed by the defendant, permitting two of the three officers (Stange, president, Decker, secretary-treasurer, and Hoffman, vice president) to sign checks in lieu of requiring defendant to countersign all checks. The evidence discloses that it was the practice for two of the three officers to sign the checks, and that it was never the practice for defendant to countersign all checks solely. Upon this phase of the case Decker testified that "Hoffman signed checks during the two and a half years he was with the company. I would say he signed about forty per cent of them, that is, countersigned. *** Mr. Hoffman had authority to countersign checks but he wanted to countersign every check that went out. The company was formed in 1940 and the checking account was opened about that time. There were no changes made with reference to signing checks. He

line of business which is in direct competition with the business of Plaintiff corporation as provided in its Charter. There is no denial of the allegation in the complaint, and the master found that a demand was made upon defendant to return the certificate of stock which he had received when the agreement was made, and he also found that "there has been a total failure of the consideration for which the 50 shares of stock in Plaintiff corporation were delivered to defendant."

The principal factual question presented is whether defendant abandoned the employment of the corporation without cause. His only excuse for leaving was that Plaintiff attached paragraph 12 of the agreement which provided that all checks for the disbursement of corporate funds should be countersigned by defendant. Plaintiff, however, introduced evidence, and the master found, that a corporate resolution was duly adopted, which was signed by the following persons: two of the three officers (manager, president, secretary-treasurer, and Hoffman, vice president) to sign checks in lieu of requiring defendant to countersign all checks. The evidence discloses that it was the practice for two of the three officers to sign the checks, and that it was never the practice for defendant to countersign all checks. Upon this phase of the case the master testified that Hoffman signed checks during the two and a half years he was with the company. I would say he signed about forty per cent of them, that is, countersigning. Mr. Hoffman had authority to countersign checks but he wanted to countersign every check that went out. The company was formed in 1940 and the checking account was opened about that time. There were no changes made with reference to signing checks. He

never objected to nor did he ask to be allowed to countersign every check prior to the time he discussed that matter with me in May, 1943." When called as an adverse witness, Hoffman testified that "I did not sign all the checks. I signed some checks, practically all labor checks. I was the superintendent in the plant. I signed all checks pertaining to the labor in the plant. There were some checks that I did not sign. *** I should say the number of labor checks I signed was more or less around a thousand." His testimony amounted to an admission of the genuineness of his signature to the resolution authorizing checks to be countersigned by any two of the three officers of the corporation.

John Linner, auditor of the Terminal National Bank of Chicago, with which the corporation had a checking account, who was called on behalf of plaintiffs, brought with him, in response to a subpoena duces tecum, a certified copy of the corporate resolution authorizing any two of the three officers to sign checks, which was offered and received in evidence.

There was evidence before the master that Hoffman signed approximately 1900 out of 3200 checks issued during the time that he was in the employ of the corporation, and the uncontroverted evidence indicates that he did countersign in excess of half the checks issued.

Decker testified on direct examination that Hoffman worked for the corporation until June 19, 1943. He stated that "I came to the plant that day. In the office Mr. Hoffman asked me if I could start this plant up Monday morning. I said, 'I do not know. Why?' He answered, 'I am quitting.' I said, 'I suppose I will have to.' He then picked up his clothes and tools and left and gave no reason for leaving. That is all he said to me that day. He did not return to work

never objected to nor did he seek to be allowed to communicate
every check prior to the time he discussed that matter with
me in 1943. When called as an adverse witness, Hoffman
testified that "I did not sign all the checks. I signed
some checks, practically all labor checks. I was the super-
intendent in the plant. I signed all checks pertaining to
the labor in the plant. There were some checks that I did not
sign. I should say the number of labor checks I signed
was more or less around a thousand." His testimony amounted
to an admission of the genuineness of his signature to the
resolution authorizing checks to be counterfeited by any two
of the three officers of the corporation.
John Hines, auditor of the Terminal National Bank of
Chicago, with which the corporation had a checking account,
who was called on behalf of plaintiffs, brought with him, in
response to a subpoena duces tecum, a certified copy of the
corporate resolution authorizing any two of the three officers
to sign checks, which was offered and received in evidence.
There was evidence before the jury that Hoffman signed
approximately 1,000 out of 2,000 checks issued during the time
that he was in the employ of the corporation, and the uncon-
victed evidence indicates that he did counterfeits in excess of
half the checks issued.
Decker testified on direct examination that Hoffman
worked for the corporation until June 12, 1943. He stated
that "I came to the plant that day. In the office Mr. Hoffman
asked me if I could start this plant on Monday morning. I
said, 'I do not know. Why?' He answered, 'I am quitting.'
I said, 'I suppose I will have to.' He then picked up his
clothes and tools and left and gave no reason for leaving.
That is all he said to me that day. He did not return to work

on the following Monday nor at any time after June 19, 1943." Hoffman does not assign any reason for quitting except that pertaining to the countersigning of checks, which has already been related. Upon this state of the evidence the master could not fairly have made any other finding except that defendant voluntarily left the employ of the plaintiff corporation without cause.

The second question presented is whether there was a total failure of the consideration for which one-third of the entire capital stock of the plaintiff corporation was delivered to defendant. The salient evidence bearing upon this question discloses that defendant paid no cash consideration for the stock; that he received a regular salary for services rendered by him while employed by the plaintiff corporation; and that he left the employ of the plaintiff corporation without cause, as heretofore indicated, after working less than three years under the terms of the 15-year agreement. The contract specifically fixed the term of Hoffman's employment at 15 years "unless sooner terminated by the mutual agreement of the corporation and Hoffman," and the sole consideration for the issuance of the stock to Hoffman was the continuing performance of the contract by him through its entire term. A certificate for the 50 shares was delivered to defendant upon condition that he perform all the undertakings of the contract, and although there is no express recital that one of the conditions was his agreement to remain in the employ of plaintiff corporation for 15 years, the clear implication was that this was the principal consideration for issuing the stock because no cash was paid and there is no other plausible reason why one-third of the stock should have been issued to him. The master so found, and the record sustains that conclusion. Therefore, since he breached the condition, we think there was a failure

on the following Monday not at any time after June 12, 1947." Hoffman does not assign any reason for putting except that pertaining to the counterfeiting of checks, which has already been related. Upon this state of the evidence the master could not fairly have made any other finding except that defendant voluntarily left the employ of the plaintiff corporation without cause.

The second question presented is whether there was a total failure of the consideration for which one-third of the entire capital stock of the plaintiff corporation was delivered to defendant. The salient evidence bearing upon this question discloses that defendant paid no cash consideration for the stock; that he received a regular salary for services rendered by him while employed by the plaintiff corporation; and that he left the employ of the plaintiff corporation without cause, as heretofore indicated, after working less than three years under the terms of the 1-year agreement. The contract specifically fixed the term of Hoffman's employment at 12 years "unless sooner terminated by the mutual agreement of the corporation and Hoffman," and the sole consideration for the issuance of the stock to Hoffman was the continuing performance of the contract by him through its entire term. A certificate for the 50 shares was delivered to defendant upon condition that he perform all the undertakings of the contract, and although there is no express recital that one of the conditions was his agreement to remain in the employ of plaintiff corporation for 12 years, the clear implication is that this was the principal consideration for issuing the stock because no cash was paid and there is no other plausible reason why one-third of the stock should have been issued to him. The master so found, and the record sustains that conclusion. Therefore, since he breached the condition, we think there was a failure

of the sole consideration for the issuance of the stock. The authorities are in accord that where one of the parties to a contract repudiates it, that is, either expressly or tacitly refuses to go on with it or to perform his part of it, the other party not being in default has the right to rescind the contract and to be restored to his former status as to anything he may have already done under it, and if such abandonment is complete and is continued for a sufficient length of time to evince a purpose not to resume or complete the contract, it furnishes ground for rescission by the other party. Black, Rescission and Cancellation (2d ed.), sec. 196, pp. 545-549. Under this rule of law a failure of consideration is sufficient ground in equity for the rescission of a contract or the cancellation of a conveyance, and the rule is well recognized in equity jurisprudence, and is discussed in 17 C. J. S. Contracts sec. 420, p. 905. The courts in this state have likewise recognized the rule and given it effect in a variety of cases. Wall et al. v. Chicago Park District, 378 Ill. 81; University Club of Chicago v. Deakin, 265 Ill. 257. In the recent case of Corzine et al. v. Keith (1943), 384 Ill. 435, the court held the law to be uniformly established in this state that where one voluntarily conveys his property in consideration of support and maintenance during his life, and the grantee afterwards refuses or neglects to perform the contract, a court of equity will grant relief by setting aside the deed and reinvesting the grantor with title. The court cited Fabrice v. Von der Brelie, 190 Ill. 460, and Luttrell v. Wyatt, 305 Ill. 274, and said that "The court will infer, from the grantee's refusal to perform, a fraudulent intent in the first instance in entering into the agreement and grant a rescission on the ground of such fraudulent intention." We find in 39

of the sole consideration for the release of the debtor.
The authorities are in accord that where one of the parties
to a contract repudiates it, that is, either expressly or
tacitly refuses to go on with it or to perform his part of
it, the other party not being in default has the right to
rescind the contract and to be restored to his former status
as to anything he may have already done under it, and if such
abandonment is complete and is continued for a sufficient
length of time to evince a purpose not to resume or complete
the contract, it furnishes ground for rescission by the other
party. Black, Rescission and Cancellation (3d ed.), sec. 196,
pp. 547-549. Under this rule of law a finding of consideration
is sufficient ground in equity for the rescission of a contract
on the cancellation of a conveyance, and the rule is well re-
cognized in equity jurisprudence, and is discussed in 17 C.
L. J. Contracts sec. 420, p. 905. The courts in this state
have likewise recognized the rule and given it effect in a
variety of cases. All et al. v. Chicago Park District, 298
Ill. 81; University Club of Chicago v. Wehring, 257 Ill. 237.
In the recent case of Goring et al. v. Heitz (1944), 384 Ill.
435, the court held the law to be uniformly established in
this state that where one voluntarily conveys his property in
consideration of support and maintenance during his life, and
the grantee afterwards refuses or neglects to perform the con-
tract, a court of equity will grant relief by setting aside the
deed and relieving the grantor of all obligations. The court cited
Kohlsch v. Von der Weile, 100 Ill. 441, and Hoff et al. v. Hoff,
305 Ill. 294, and said that "the court will infer, from the
grantee's refusal to perform, a fraudulent intent in the first
instance in entering into the agreement and grant a rescission
on the ground of such fraudulent intention." We find in 39

C. J. Master and Servant sec. 19, p. 49, a discussion of the rule, and authorities supporting it, that a contract of employment may be rescinded for abandonment of service. In Hillside Cemetery Assc. v. Holmes, 97 Minn. 261, 105 N. W. 905, shares of stock were issued to the defendant for services to be performed by him as a broker. He failed to comply with the agreement which required him to sell a certain amount of preferred stock, and the court granted cancellation of the stock on the ground that the consideration for its issuance had failed. Defendant here argues that "the contract by its terms specifically contemplated that after receiving one-third of the corporation stock, defendant might leave the employ of plaintiff corporation"; that "no provision was contained for forfeiture or return of the stock"; and that the only penalty provided was a covenant restricting him from engaging in a similar business in direct competition with the corporation. It is difficult to perceive why the two individual plaintiffs who had organized the corporation, invested \$5000 therein, and agreed to pay defendant a weekly salary of \$50 plus expenses, should donate one-third of the stock to defendant for any reason other than that he should remain with them for the life of the agreement and assist as plant manager in building up their business for the manufacture of insulating materials for which he was peculiarly equipped by reason of his experience and skill acquired since he had first entered their employment. Defendant further argues that "even if it were held that the stock was issued in consideration of the performance of the employment contract rather than the execution thereof, there could at most be only a partial failure of consideration in view of defendant's working for 2-2/3 years and the creating by his efforts of a going and valuable business," and his counsel say that a court of equity will not decree a rescission of

self say that a court of equity will not decree a rescission of
by his efforts of a going and valuable business, and his con-
view of defendant's working for 2-3 years and the creating
could at most be only a partial failure of consideration in
employment contract rather than the rescission thereof, there
stock was issued in consideration of the performance of the
Defendant further argues that "even if it were held that the
and skill acquired since he had first entered their employment,
which he was peculiarly equipped by reason of his experience
their business for the manufacture of insulating materials for
of the agreement and assist as plant manager in building up
reason other than that he should remain with them for the life
should donate one-third of the stock to Defendant for any
agreed to pay defendant a weekly salary of \$750 his expenses,
who had organized the corporation, invested \$500 therein, and
It is difficult to perceive why the two individual plaintiffs
similar business in direct competition with the corporation.
provided was a covenant restricting him from engaging in a
forfeiture or return of the stock"; and that the only penalty
plaintiff corporation"; that "no provision was contained for
of the corporation stock, defendant might leave the employ of
terms specifically contemplated that after receiving one-third
had failed. Defendant here argues that "the contract by its
stock on the ground that the consideration for its issuance
preferred stock, and the court granted cancellation of the
the agreement which required him to sell a certain amount of
to be performed by him as a broker. He failed to comply with
905, shares of stock were issued to the defendant for services
Hillside Cemetery Assoc. v. Holmes, 27 Minn. 201, 105 N. W.

Hillside Cemetery Assoc. v. Holmes, 27 Minn. 201, 105 N. W.
employment may be rescinded for abandonment of service, in
the rule, and authorities supporting it, that a contract or

C. J. Master and servant sec. 19, p. 40, a discussion of

a contract where there is only a partial failure of consideration, especially when the party against whom the rescission is sought cannot be placed in status quo. This argument is predicated upon the assumption that the transfer of stock was a completed transaction but, as already indicated, we are of opinion that the defendant did not receive the stock outright but upon an implied condition that he would remain in the employ of the plaintiff corporation. Of course, if plaintiffs' position is sound that they are entitled to the return of the shares of stock because the consideration for which the stock was given had failed, there would be no difficulty in restoring the status quo. The finding of the master that the stock was delivered upon the condition that the defendant perform all the contract, is amply supported by the agreement itself and by evidence adduced upon the hearing. It is a fact that defendant did not perform his agreement, and therefore we think he is not entitled to retain the stock and that the chancellor should have entered a decree in conformity with the master's recommendation and required either a return of the stock to plaintiffs or a cancellation thereof.

The remaining question presented is whether plaintiffs were entitled to an injunction restraining Hoffman from engaging in business for himself in the City of Bolton within the period of five years. Plaintiffs did not ask for a temporary restraining order when the complaint was filed but sought only to enjoin Hoffman from disposing of his stock, nor did they ask for a permanent injunction to restrain defendant from violating the covenant of which they now complain. They now urge that a general prayer for relief, as contained in the complaint, is sufficient to support any decree warranted by the facts and established by the evidence, and apparently they were not as much concerned with the restraining order

a contract here there is only a partial failure of consideration, especially when the party insists that the consideration is brought cannot be placed in issue here. This argument is predicated upon the assumption that the transfer of stock was a completed transaction but, as already indicated, we are of opinion that the defendant did not receive the stock outright but upon an implied condition that he would remain in the employ of the plaintiff corporation. Of course, if plaintiff's position is sound then they are entitled to the return of the shares of stock because the consideration for which the stock was given had failed, there would be no difficulty in restoring the shares. The finding of the master that the stock was delivered upon the condition that the defendant perform all the contract, is amply supported by the evidence itself and by evidence advanced upon the hearing. It is a fact that defendant did not perform his agreement, and therefore we think he is not entitled to retain the stock and that the corporation should have entered a decree in conformity with the master's recommendation and required either a return of the stock to plaintiff or a cancellation thereof.

The remaining question presented is whether plaintiffs were entitled to an injunction restraining Hoffman from engaging in business for himself in the City of Boston within the period of five years. Plaintiff did not ask for a temporary restraining order when the complaint was filed but sought only to enjoin Hoffman from disposing of his stock, nor did they ask for a permanent injunction to restrain Hoffman and from violating the covenant of which they now complain. They now urge that a general prayer for relief, as contained in the complaint, is sufficient to support any decree warranted by the facts and established by the evidence, and apparently they were not as much concerned with the restraining order

as the return of the stock, to which we think they are rightly entitled. The determination of the question presented must be resolved from the facts. It is conceded that plaintiffs are engaged in the manufacture of rock wool, and do not carry on an insulating business. On the other hand, Hoffman has several blow-trucks with which he does the insulating work, and does not manufacture rock wool. He purchases the material from concerns other than the plaintiff corporation. Plaintiffs argue that these other concerns are manufacturers of rock wool and therefore in a competitive business with them. That seems to us not to have been within the contemplation of the negative covenant prohibiting Hoffman, within the five-year period, from engaging in competition with plaintiffs.

For the reasons indicated the decree of the Circuit court is reversed and the cause is remanded with directions that a decree be entered in conformity with the views herein expressed.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

as the return of the stock, to which we think they are right-

ly entitled. The determination of the question presented

must be resolved from the facts. It is conceded that

plaintiffs are engaged in the manufacture of rock wool,

and do not carry on an insulating business. On the other

hand, Hoffman has several blow-trunks with which he does

the insulating work, and does not manufacture rock wool.

He purchases the material from concerns other than the

plaintiff corporation. Plaintiffs argue that these other

concerns are manufacturers of rock wool and therefore in a

competitive business with them. That seems to us not to

have been within the contemplation of the restrictive covenant

prohibiting Hoffman, within the five-year period, from

engaging in competition with plaintiffs.

For the reasons indicated the decree of the Circuit

court is reversed and the cause is remanded with directions

that a decree be entered in conformity with the views

herein expressed.

ORDER REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Learned and Sullivan, JJ., concur.

43539

329 I.A. 645³

THERM-O-PROOF INSULATION MANUFACTURING
CO., a corporation, MARSHALL DECKER
and EDWARD STANGE,

Appellants,

v.

PHILIP HOFFMAN,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

OPINION ON REHEARING.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs appealed from a decree dismissing their complaint which sought the cancellation of 50 shares of stock held by defendant in the plaintiff corporation, and such other relief as the court should deem just and equitable. A general reference was had to a master in chancery, who found in favor of plaintiffs and recommended a decree in conformity with his finding. However, pursuant to a hearing by the chancellor, exceptions to the master's report were sustained, and a decree was entered dismissing the complaint for want of equity. In our original opinion we reversed the decree and remanded the cause with directions. Subsequently defendant filed his petition for a rehearing, which was allowed, and plaintiffs filed their answer thereto.

The facts essential to an understanding of the issues involved disclose that for some years prior to the events which gave rise to this litigation the plaintiffs, Decker and Stange, owned and operated the Therm-O-Proof Insulation Company, which installed rock wool material in the walls of buildings. The defendant, Hoffman, worked for this company as a helper on the installation crew for about ten years, through which he acquired experience in insulation work and skill in the manufacture of wool to be used for insulation purposes. In 1940 Decker and Stange formed the Therm-O-Proof Insulation Manufacturing

82914-15

43232

THE THERM-O-PROOF INSULATION MANUFACTURING CO., a corporation, MARSHALL DESIGN and EDWARD STANGE,

Appellants,

CIRCUIT COURT,

COOK COUNTY,

Appellee.

PHILIP HOFFMAN,

OPINION ON REHEARING.

MR. JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

Plaintiffs appealed from a decree dismissing their complaint which sought the cancellation of 20 shares of stock held by defendant in the plaintiff corporation, and such other relief as the court should deem just and equitable. A general reference was had to a master in chancery, who found in favor of plaintiffs and recommended a decree in conformity with his finding. However, pursuant to a hearing by the chancellor, exceptions to the master's report were sustained, and a decree was entered dismissing the complaint for want of equity. In our original opinion we reversed the decree and remanded the cause with directions. Subsequently defendant filed his petition for a rehearing, which was allowed, and plaintiffs filed their answer thereto.

The facts essential to an understanding of the issues involved disclose that for some years prior to the events which gave rise to this litigation the plaintiffs, Becker and Stange, owned and operated the Therm-O-Proof Insulation Company, which installed rock wool material in the walls of buildings. The defendant, Hoffman, worked for this company as a helper on the installation crew for about ten years, through which he acquired experience in insulation work and skill in the manufacture of wool to be used for insulation purposes. In 1940 Becker and Stange formed the Therm-O-Proof Insulation Manufacturing

Company, which will hereafter be referred to as the corporation. Although the former company merely installed insulating material, the charter of the new corporation gave it power to manufacture as well as install such material. The individual plaintiffs paid the entire capitalization of \$5000 of the corporation, which was evidenced by 150 shares of no par value stock. Its plant was established at 147th street and Indiana avenue in the City of Dolton, Illinois.

On the date of the filing of the articles of incorporation, October 14, 1940, a contract was entered into by Decker and Stange on behalf of themselves and the corporation, and the defendant. The contract provided in substance that defendant would work for the corporation in the capacity of plant superintendent and general manager for a period of 15 years; that he was to receive \$50 per week for his services; and that in the event he should terminate the employment before the designated term, he would not enter into a similar business in any capacity directly or indirectly, within a reasonable distance from the site of the plant for a period of five years. The agreement provided for the transfer of one-third (50 shares) of the corporate stock of the corporation to defendant. He paid no cash consideration for the stock, and in addition to his stated weekly salary he also had an expense account from the corporation. The agreement expressly stated that were it not for the promise of defendant to enter into the employment of the corporation, plaintiffs would not have organized it; and that plaintiffs had been induced to organize the corporation on the basis of the representations of the defendant and to enter into the contract because of his peculiar and unique knowledge of the process of manufacturing insulation products.

On June 19, 1943 defendant, after working less than three

Company, which will hereafter be referred to as the corporation. Although the former company merely installed insulating material, the charter of the new corporation gave it power to manufacture as well as install such material. The individual plaintiffs paid the entire capitalization of \$2000 of the corporation, which was evidenced by 150 shares of no par value stock. Its plant was established at 147th Street and Indiana Avenue in the City of Boston, Illinois.

On the date of the filing of the articles of incorporation, October 14, 1940, a contract was entered into by Becker and Stange on behalf of themselves and the corporation, and the defendant. The contract provided in substance that defendant would work for the corporation in the capacity of plant superintendent and general manager for a period of 15 years; that he was to receive \$50 per week for his services; and that in the event he should terminate the employment before the designated term, he would not enter into a similar business in any capacity directly or indirectly, within a reasonable distance from the site of the plant for a period of five years. The agreement provided for the transfer of one-third (50 shares) of the corporate stock of the corporation to defendant. He paid no cash consideration for the stock, and in addition to his stated weekly salary he also had an expense account from the corporation. The agreement expressly stated that were it not for the promise of defendant to enter into the employment of the corporation, plaintiffs would not have organized it; and that plaintiffs had been induced to organize the corporation on the basis of the representations of the defendant and to enter into the contract because of his peculiar and unique knowledge of the process of manufacturing insulation products.

On June 19, 1943 defendant, after working less than three

years under the fifteen-year contract, left the employ of the corporation "without cause," as the master found, "and went into a line of business which is in direct competition with the business of plaintiff corporation as provided in its Charter." There is no denial of the allegation in the complaint, and the master found that a demand was made upon defendant to return the certificate of stock which he had received when the agreement was made, and he also found that "there has been a total failure of the consideration for which the 50 shares of stock in plaintiff corporation were delivered to defendant."

The principal factual question presented was whether defendant abandoned the employment of the corporation without cause. The evidence disclosed that the only excuse assigned by him for leaving was that plaintiffs breached paragraph 12 of the agreement, which provided that all checks for the disbursement of corporate funds should be countersigned by him. From the uncontroverted evidence adduced before the master it appeared that a corporate resolution had been adopted which was signed by defendant, permitting two of the three officers (Stange, president, Decker, secretary-treasurer, and Hoffman, vice president) to sign checks in lieu of requiring defendant to countersign all checks, and it also appeared from the evidence that Hoffman signed approximately 1900 out of 3200 checks issued during the time that he was in the employ of the corporation. Upon that state of the record we held that the master could not have fairly made any other finding except that defendant voluntarily left the employ of the plaintiff corporation without cause, and upon a re-examination of the evidence we are convinced that that finding is abundantly sustained by the evidence and that the record is not susceptible of any other reasonable interpretation.

The master also found that shortly after leaving the

The master also found that shortly after leaving the any other reasonable interpretation.

tained by the evidence and that the record is not susceptible of evidence we are convinced that that finding is abundantly sustained corporation without cause, and upon a re-examination of the except that defendant voluntarily left the employ of the plaintiff that the master could not have fairly made any other finding

employ of the corporation. Upon that state of the record we held 1900 out of 3200 checks issued during the time that he was in the also appeared from the evidence that Hoffman signed approximately in lieu of repaying defendant to counterclaim all checks, and it secretary-treasurer, and Hoffman, vice president) to sign checks permitting two of the three officers (Stange, president, Becker, corporate resolution had been adopted which was signed by defendant, verted evidence adduced before the master it appeared that a corporate funds should be counterclaimed by him. From the misstatement, which provided that all checks for the disbursement of corporation was that plaintiff's proposed paragraph 12 of the agreement leaving was that plaintiff disclosed that the only excuse assigned by him for The evidence abandoned the employment of the corporation without cause.

The principal factual question presented was whether defendant were delivered to defendant."

consideration for which the 50 shares of stock in plaintiff corporation and he also found that "there has been a total failure of the case of stock which he had received when the agreement was made, found that a demand was made upon defendant to return the certificate is no denial of the allegation in the complaint, and the master ness of plaintiff corporation as provided in its Charter." There a line of business which is in direct competition with the business corporation "without cause," as the master found, "and went into years under the fifteen-year contract, left the employ of the

employ of the corporation, defendant engaged in the business of installing insulation material from a place of business in Dolton, Illinois which is approximately two miles from the corporation's plant; that he purchased insulation material for use in his business from sources which were in direct competition with the corporation; that he advertised the business in the classified directory of the City of Dolton under the heading "Insulation," which was in the same column as the business of the corporation; and he concluded that defendant was engaged in "a line of business which is in direct competition with the business of plaintiff corporation as provided in its Charter," and therefore found that there was a total failure of consideration both with respect to defendant's abandonment of the contract without cause and to his violation of the negative covenant by which he agreed not to engage directly or indirectly, either as a partner, employee, stockholder, adviser or in any other capacity, in any business of a nature similar to that engaged in by the corporation, and accordingly the master recommended that defendant should be required to surrender to plaintiffs the certificate of stock issued to him.

In our original opinion we sustained the master's finding that defendant's voluntary abandonment of his contract with plaintiffs, without cause, constituted such a failure of consideration as would warrant the rescission of the contract and require the surrender or cancellation of defendant's 50 shares of stock; but inasmuch as plaintiffs did not ask for either a temporary or permanent restraining order when the complaint was filed, and also because defendant was engaged only in insulating buildings and not in the manufacture of rock wool, we held that defendant had not breached the negative covenant of the contract.

In his petition for rehearing defendant's counsel reiterate the argument made in their original brief that the court had no jurisdiction to enter the decree because a court of equity has no

employ of the corporation, defendant engaged in the business of installing insulation material from a place of business in Bolton, Illinois which is approximately two miles from the corporation's plant; that he purchased insulation material for use in his business from sources which were in direct competition with the corporation; that he advertised the business in the classified directories of the City of Bolton under the heading "Insulation," which was in the same column as the business of the corporation; and he conceded that defendant was engaged in "a line of business which is in direct competition with the business of plaintiff corporation as provided in its Charter," and therefore found that there was a total failure of consideration both with respect to defendant's abandonment of the contract without cause and to his violation of the negative covenant by which he agreed not to engage directly or indirectly, either as a partner, employee, stockholder, adviser or in any other capacity, in any business of a nature similar to that engaged in by the corporation, and accordingly the master recommended that defendant should be required to surrender to plaintiff the certificate of stock issued to him.

In our original opinion we sustained the master's finding that defendant's voluntary abandonment of his contract with plaintiff, without cause, constituted such a failure of consideration as would warrant the rescission of the contract and require the surrender or cancellation of defendant's 50 shares of stock; but inasmuch as plaintiff did not ask for either a temporary or permanent restraining order when the complaint was filed, and also because defendant was engaged only in installing buildings and not in the manufacture of rock wool, we hold that defendant had not breached the negative covenant of the contract.

In his petition for rehearing defendant's counsel reiterates the argument made in their original brief that the court had no jurisdiction to enter the decree because a court of equity has no

jurisdiction to affirmatively enforce a forfeiture, and they quote at length from Tarr v. Stearman, 264 Ill. 110, and Patterson v. Vermillion Academy, 312 Ill. 386, in support of the contention that the object sought by plaintiffs and ordered to be granted in our original opinion, is wholly foreign to equity jurisdiction. Both of these cases were previously cited by defendant in his original brief and merely contain general expressions that equity abhors a forfeiture and will not render its aid to enforce one because of a breach of a condition subsequent. Neither of the cases denies the power of a court of equity to order a reconveyance because of a failure of consideration. Defendant's argument that a court of equity has no jurisdiction to affirmatively enforce a forfeiture has no application to the circumstances of this case, and the two foregoing cases cited in support of that proposition do not support the contention made.

The real question presented is whether there was such a failure of consideration as to justify plaintiffs in rescinding the contract and obtaining a cancellation of the 50 shares of stock issued to defendant. Defendant argues, as his second proposition, that the stock was transferred upon two considerations: (1) defendant's agreement to work for the corporation for 15 years, and (2) his agreement not to enter into a business similar to that of the corporation within a reasonable distance from the situs of the plant for a period of five years; that the master predicated his recommendations upon the finding that there was a total failure of both considerations; and that in view of our conclusion in the original opinion that defendant did not breach his agreement to refrain from entering into a similar business, there was only a partial failure of consideration, upon which a rescission could not be predicated. In

jurisdiction to affirmatively enforce a forfeiture, and they quote at length from Tark v. Usher, 204 Ill. 110, and Patterson v. Vermillion Academy, 312 Ill. 386, in support of the contention that the object sought by plaintiffs and ordered to be granted in our original opinion, is wholly foreign to equity jurisdiction. Both of these cases are previously cited by defendant in his original brief and merely contain general expressions that equity abhors a forfeiture and will not render its aid to enforce one because of a breach of a condition subsequent. Neither of the cases denies the power of a court of equity to order a reconveyance because of a failure of consideration. Defendant's argument that a court of equity has no jurisdiction to affirmatively enforce a forfeiture has no application to the circumstances of this case, and the two foregoing cases cited in support of that proposition do not support the contention made.

The real question presented is whether there was such a failure of consideration as to justify plaintiffs in rescinding the contract and obtaining a cancellation of the 50 shares of stock issued to defendant. Defendant argues, as his second proposition, that the stock was transferred upon two considerations: (1) defendant's agreement to work for the corporation for 15 years, and (2) his agreement not to enter into a business similar to that of the corporation within a reasonable distance from the situs of the plant for a period of five years; that the latter precluded his recommendations upon the finding that there was a total failure of both considerations; and that in view of our conclusion in the original opinion that defendant did not breach his agreement to refrain from entering into a similar business, there was only a partial failure of consideration, upon which a rescission could not be predicated. In

other words, it is urged that to constitute a failure of consideration defendant must have breached all the material provisions of his contract. This is not the rule as we understand it. A wrongdoer who has committed a material breach of a contract cannot defend on the ground that in other material respects he has not violated his undertaking. There can be no doubt in the instant case that the principal consideration for the issuance of stock to the defendant was the continuing performance of the contract by him throughout its entire term. As stated in our original opinion, "it is difficult to perceive why the two individual plaintiffs who had organized the corporation, invested \$5000 therein, and agreed to pay defendant a weekly salary of \$50 plus expenses, should donate one-third of the stock to defendant for any reason other than that he should remain with them for the life of the agreement and assist as plant manager in building up their business for the manufacture of insulating materials for which he was peculiarly equipped by reason of his experience and skill acquired since he had first entered their employment." Inasmuch as he voluntarily abandoned his employment without cause after less than three years, it would be unconscionable to permit him to retain one-third of the stock of the corporation. As pointed out in our original opinion, the rule is clearly established that where one of the parties to a contract repudiates it, that is, either expressly or tacitly refuses to go on with it or to perform his part of it, the other party not being in default, has the right to rescind the contract and to be restored to his former status as to anything he may have already done under it, and if such abandonment is complete and is continued for a sufficient length of time to evince a purpose not to resume or complete the contract, it furnishes ground for rescission by the other party. Black on Rescission and Cancellation (2d ed.),

other words, it is urged that to constitute a failure of consid-
eration defendant must have breached all the material provisions
of his contract. This is not the rule as we understand it. A
wrongdoer who has committed a material breach of a contract
cannot defend on the ground that in other material respects he
has not violated his undertaking. There can be no doubt in the
instant case that the principal consideration for the issuance
of stock to the defendant was the continuing performance of the
contract by him throughout its entire term. As stated in our
original opinion, "it is difficult to perceive why the two in-
dividual plaintiffs who had organized the corporation, invested
\$5000 therein, and agreed to pay defendant a weekly salary of \$750
plus expenses, should donate one-third of the stock to defendant
for any reason other than that he should remain with them for the
life of the agreement and assist as plant manager in building up
their business for the manufacture of insulating materials for
which he was peculiarly equipped by reason of his experience and
skill acquired since he had first entered their employment."
Inasmuch as he voluntarily abandoned his employment without cause
after less than three years, it would be unconscionable to permit
him to retain one-third of the stock of the corporation. As
pointed out in our original opinion, the rule is clearly estab-
lished that where one of the parties to a contract repudiates
it, that is, either expressly or tacitly refuses to go on with
it or to perform his part of it, the other party not being in
default, has the right to rescind the contract and to be restored
to his former status as to everything he may have already done
under it, and if such abandonment is complete and is continued
for a sufficient length of time to evince a purpose not to resume
or complete the contract, it furnishes ground for rescission by
the other party. Black on Rescission and Cancellation (2d ed.),

vol. 1, ch. 12, sec. 196, pp. 545-549. Under the foregoing rule a failure of consideration is sufficient ground in equity for the rescission of a contract or the cancellation of a conveyance, and the courts in this and other states have recognized the rule and given it effect in a variety of cases. Wall et al. v. Chicago Park District, 378 Ill. 81; University Club of Chicago v. Deakin, 265 Ill. 257. As pointed out in our original opinion, it was held in Corzine et al. v. Keith, 384 Ill. 435, to be the uniformly established rule in this state that where one voluntarily conveys his property in consideration of support and maintenance during his lifetime, and the grantee afterwards refuses or neglects to perform the contract, a court of equity will grant relief by setting aside the deed and reinvesting the grantor with title. In the Corzine case Fabrice v. Von der Brelie, 190 Ill. 460, and Luttrell v. Wyatt, 305 Ill. 274, were cited with the comment that "The court will infer, from the grantee's refusal to perform, a fraudulent intent in the first instance in entering into the agreement and grant a rescission on the ground of such fraudulent intention." In our original opinion we also cited 39 C. J. Master and Servant sec. 19, p. 49, containing a discussion of the rule and authorities supporting it, that a contract of employment may be rescinded for abandonment of service, and we also cited and discussed Hillside Cemetary Assc. v. Holmes, 97 Minn. 261, 105 N. W. 905, as being precisely in point. In that case shares of stock were issued to the defendant for services to be performed by him as a broker. He failed to comply with the agreement which required him to sell a certain amount of preferred stock, and the court granted cancellation of the stock on the ground that the consideration for its issuance had failed. As recently as 1942 the Supreme Court in Mruk v. Mruk, 379 Ill. 394, held that where a

vol. 1, ch. 12, sec. 196, pp. 747-748. Under the foregoing rule a failure of consideration is sufficient ground in equity for the rescission of a contract or the cancellation of a conveyance, and the courts in this and other states have recognized the rule and given it effect in a variety of cases. Wells et al. v. Chicago Park District, 178 Ill. 81; University Club of Chicago v. Decker, 265 Ill. 377. As pointed out in our original opinion, it was held in Gorham et al. v. Keith, 384 Ill. 437, to be the uniformly established rule in this state that where one voluntarily conveys his property in consideration of support and maintenance during his lifetime, and the grantee afterwards refuses or neglects to perform the contract, a court of equity will grant relief by setting aside the deed and re-vesting the grantor with title. In the Gorham case Kaprice v. Von der Grefe, 190 Ill. 469, and Puttnell v. Lytle, 302 Ill. 374, were cited with the comment that "the court will infer from the grantee's refusal to perform, a fraudulent intent in the first instance in entering into the agreement and grant a rescission on the ground of such fraudulent intention." In our original opinion we also cited 39 C. J. 11, later and revised sec. 19, p. 49, containing a discussion of the rule and authorities supporting it, that a contract of assignment may be rescinded for abandonment of service, and we also cited and discussed Hillside Cemetery Assn. v. Jones, 97 Minn. 261, 105 N. W. 907, as being precisely in point. In that case shares of stock were issued to the defendant for services to be rendered by him as a broker. He failed to comply with the agreement which required him to sell a certain amount of preferred stock, and the court granted cancellation of the stock on the ground that the consideration for its issuance had failed. As recently as 1942 the Supreme Court in Bank v. Wells, 359 Ill. 394, held that where a

parent conveys real estate to his son in consideration of the latter's promise of support and a comfortable home for life, and the grantee, after receiving the property, fails to keep his promise to such an extent that equity may infer a fraudulent intent in the first instance, or where the grantee treats his father so unkindly as to make further living together intolerable for the parent, equity will rescind the contract and restore the property to the parent, and after such conduct a subsequent offer at the trial to fulfill the agreement, comes too late. Several of the cases heretofore cited and many others discussed in the opinion support the rule.

It is urged by counsel, however, that defendant partially satisfied his contract by building plaintiffs' plant and putting it into operation, and having thus completed the most difficult part of his job, his counsel say he should not be deprived of the stock, even though he abandoned his contract twelve years before its completion. Among the cases cited in our original opinion there are some in which the defendant had partially performed his contract. Thus, in Mruk v. Mruk, the son had cared for his father for approximately three years; nevertheless the court held that there was a failure of the consideration upon which the contract was predicated. The real test applied by the authorities is whether or not the matter in respect to which failure of performance occurs, is of such a nature and such importance that the contract would not have been made without it. Black on Rescission and Cancellation (2d ed.), vol. 1, ch. 12, sec. 198 at p. 555; Fossum v. Regua, 218 N. Y. 339, 113 N. E. 330. In section 197 at page 550 of Black on Rescission, it is stated: "Rescission of a contract is not permitted for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat

parent conveys real estate to his son in consideration of the latter's promise of support and a comfortable home for life, and the grantee, after receiving the property, fails to keep his promise to such an extent that equity may infer a fraudulent intent in the first instance, or where the grantee treats his father so unkindly as to make further living together intolerable for the parent, equity will rescind the contract and restore the property to the parent, and after such conduct a subsequent offer at the trial to fulfill the agreement, seems too late. Several of the cases heretofore cited and many others discussed in the opinion support the rule.

It is urged by counsel, however, that defendant partially satisfied his contract by building plaintiff's place and putting it into operation, and having thus completed the most difficult part of his job, his counsel say he should not be deprived of the stock, even though he abandoned his contract twelve years before its completion. Among the cases cited in our original opinion there are some in which the defendant had partially performed his contract. Thus, in Clark v. Clark, the son had cared for his father for approximately three years; nevertheless the court held that there was a failure of the consideration upon which the contract was predicated. The real test applied by the authorities is whether or not the matter in respect to which failure of performance occurs, is of such a nature and such importance that the contract would not have been made without it. Black on Rescission and Cancellation (2d ed.), vol. 1, ch. 12, sec. 198 at p. 555; Wossburn v. Bannan, 213 N. E. 329, 113 N. E. 330. In section 197 at page 550 of Black on Rescission, it is stated: "Rescission of a contract is not permitted for a casual, technical, or unimportant breach or failure of performance, but only for a breach so substantial as to tend to defeat

the very object of the contract," citing Callanan v. Keeseville etc. R. Co., 199 N. Y. 268, 92 N. E. 747; St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 N. E. 701; Weintz v. Hafner, 78 Ill. 27; and City of Elgin v. Joslyn, 136 Ill. 525. In section 213 at page 601 Black says that "In numerous cases the courts have refused rescission of a contract on the ground of the breach of a condition subsequent, on the general principle that there is in such cases an adequate remedy at law by an action for damages. But the true rule appears to be that rescission or cancellation may properly be ordered where that which was undertaken to be performed in the future was so essential a part of the bargain that the failure of it must be considered as destroying or vitiating the entire consideration of the contract, or so indispensable a part of what the parties intended that the contract would not have been made with that condition omitted," citing numerous decisions.

In the case at bar plaintiffs had been engaged in the business of insulating buildings, and when the instant agreement was made they evidently conceived the idea of entering into the manufacture of insulating material. During the ten years in which defendant had been employed by them, he had acquired such special skill and knowledge as, in the opinion of plaintiffs, would enable them to enter into the larger field of manufacturing insulating material, and it was undoubtedly paramount in their minds, in organizing the corporation and entering into the agreement with defendant, that he should remain in their employ for 15 years so that the business could become firmly established, and the continuance of his employment for that period was undoubtedly one of the principal considerations for the issuance of 50 shares of stock to him. No other conclusion can be fairly reached from an examination of the contract and the record in this case. Under the authorities cited it is idle for defendant

Under the authorities cited it is able for defendant
resched from an examination of the contract and the record in
of 50 shares of stock to him. No other conclusion can be fairly
doubtedly one of the principal considerations for the issuance
and the continuance of his employment for that period was an-
15 years so that the business could become firmly established,
went with defendant, that he should remain in their employ for
minds, in organizing the corporation and entering into the agree-
insulating material, and it was undoubtedly paramount in their
world enable them to enter into the larger field of manufacturing
special skill and knowledge as, in the opinion of plaintiffs,
which defendant had been employed by them, he had acquired such
manufacture of insulating material. During the ten years in
was made they evidently conceived the idea of entering into the
business of insulating buildings, and then the instant agreement
In the case at bar plaintiffs had been engaged in the
condition omitted," citing numerous decisions.
intended that the contract would not have been made with that
of the contract, or so indispensable a part of what the parties
considered as destroying or violating the entire consideration
essential a part of the bargain that the failure of it must be
which was undertaken to be performed in the future was so
rescission or cancellation may properly be ordered where that
action for damages. But the true rule appears to be that
that there is in such cases an adequate remedy at law by an
of the breach of a condition subsequent, on the general principle
the courts have refused rescission of a contract on the ground
In section 213 at page 501 Black says that "In numerous cases
v. Hainer, 78 Ill. 27; and City of Moline v. Joselyn, 130 Ill. 252.
v. Santa Clara Lumber Co., 186 W. R. 89; 78 W. R. 701; Hainer
etc. R. Co., 199 W. R. 266, 92 W. R. 747; St. Louis Paper Co.
the very object of the contract," citing Callahan v. Keeseeville

to argue that a partial failure of consideration will not warrant a rescission. If the failure of consideration is such as, in effect and reality, will take away all the value of the consideration, it will be regarded as having wholly failed. 17 C. J. S. Contracts sec. 130, p. 477; Shimans v. Stevenson, 248 Mich. 104, 226 N. W. 838.

Lastly it is argued by defendant that, conceding that he breached the contract by voluntarily abandoning his employment with the corporation, the only penalty provided in the contract for its breach was the covenant restraining him from engaging in a similar business in direct competition with the corporation. We think this argument was conclusively and satisfactorily answered in our original opinion, wherein we pointed out that it would be difficult to perceive why the two individual plaintiffs who had organized the corporation, invested their money therein and agreed to pay defendant a weekly salary, should donate one-third of the stock to him for any reason other than that he should remain with them for the life of the agreement and assist as plant manager in building up their business for the manufacture of insulating materials for which he was peculiarly equipped by reason of his experience and skill acquired since he had first entered their employment. In connection with this contention defendant argued that "even if it were held that the stock was issued in consideration of the performance of the employment contract rather than the execution thereof, there could at most be only a partial failure of consideration in view of defendant's working for 2-2/3 years and the creating by his efforts of a going and valuable business." We pointed out in our original opinion that this argument is predicated upon the assumption that the transfer of stock was a completed transaction, whereas we were and are of the opinion that defendant did not re-

to argue that a partial failure of consideration will not warrant a rescission. If the failure of consideration is such as, in effect and reality, will take away all the value of the consideration, it will be regarded as having wholly failed. 17 C. 2, 2. Contracts sec. 130, p. 477; Shimizu v. Stevenson, 248 Mich. 104, 226 N. W. 838.

Lastly it is argued by defendant that, conceding that he breached the contract by voluntarily abandoning his employment with the corporation, the only penalty provided in the contract for its breach was the government restraining him from engaging in a similar business in direct competition with the corporation. We think this argument was conclusively and satisfactorily

answered in our original opinion, wherein we pointed out that it would be difficult to perceive why the two individual plaintiffs who had organized the corporation, invested their money therein and agreed to pay defendant a weekly salary, should donate one-third of the stock to him for any reason other than that he should remain with them for the life of the agreement and assist as plant manager in building up their business for

the manufacture of insulating materials for which he was peculiarly equipped by reason of his experience and skill acquired since he had first entered their employment. In connection with this contention defendant argued that "even if it were held that the stock was issued in consideration of the performance of the employment contract rather than the execution thereof, there

could at most be only a partial failure of consideration in view of defendant's working for 2-2½ years and the creating by his efforts of a going and valuable business." We pointed out in our original opinion that this argument is predicated upon the assumption that the transfer of stock was a completed transaction, whereas we were and are of the opinion that defendant did not re-

-11-

ceive the stock outright but in consideration of his agreement to remain with them.

For the reasons indicated we adhere to the conclusions reached in our original opinion. Therefore, the decree of the Circuit Court is reversed and the cause is remanded with directions that a decree be entered requiring the surrender or cancellation of the stock in question.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scanlan, J., concur.

ceive the stock outright but in consideration of his agreement to remain with them.

For the reasons indicated we adhere to the conclusions reached in our original opinion. Therefore, the decree of the Circuit Court is reversed and the case is remanded with directions that a decree be entered regarding the surrender or cancellation of the stock in question.

DECREE REVERSED AND CASE
REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Scamman, J., concur.

43443

JOHN H. THOMPSON, Appellee,

v.

ELGIN, JOLIET AND EASTERN
RAILWAY COMPANY, a corporation,
Appellant.

363 A
APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

829 I.A. 646

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while employed by defendant as foreman of a switching crew transporting ladles of hot slag from the blast furnaces of Carnegie-Illinois Corporation at Gary, Indiana, to the dumping grounds on Lake Michigan. He brought an action at common law because the run was an intrastate movement, thus not constituting a cause of action under the Federal Employers' Liability Act (45 U.S.C.A., sec. 51 et seq.), and also because the Workmen's Compensation Act of Indiana is specifically not applicable to railroad trainmen (Burns Ann. Ind. Stat., sec. 40-1202). Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$10,000, from which defendant has taken an appeal.

Plaintiff had been employed by defendant as a switchman since 1937, and had been steadily engaged on the so-called "hot-cinder run" for approximately six months prior to the accident. There were five crews working on this run, each crew making three round trips between the blast furnaces and the dumping grounds in the course of an eight-hour run, a distance of about five or six miles. The accident occurred on the third and last trip of the midnight to 8:00 a.m. turn on the morning of March 11, 1944, when the caboose in which plaintiff was riding at the forward end of the movement, derailed at a switch on the main lead track shortly after leaving the cinder dump.

When plaintiff's crew left the blast furnaces on the trip

JOHN H. THOMPSON,
Appellee,

v.

BLAIR, JEROME AND WATSON
RAILWAY COMPANY, a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRANK DELANEY delivered the opinion of the court.

Plaintiff was injured while employed by defendant as foreman of a switching crew transporting loads of hot slag from the blast furnaces of Carnegie-Illinois Corporation at Gary, Indiana, to the dumping grounds on Lake Michigan. He brought an action at common law because the firm was an interstate movement, thus not constituting a cause of action under the Federal Employers' Liability Act (45 U.S.C.A., sec. 51 et seq.), and also because the Workmen's Compensation Act of Indiana is specifically not applicable to railroad firemen (Burns Ann. Ind. Stat., sec. 40-1202). Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$10,000, from which defendant has taken an appeal.

Plaintiff had been employed by defendant as a switchman since 1937, and had been steadily engaged on the so-called "hot-cinder run" for approximately six months prior to the accident. There were five crews working on this run, each crew making three round trips between the blast furnaces and the dumping grounds in the course of an eight-hour run, a distance of about five or six miles. The accident occurred on the third and last trip of the midnight to 8:00 a.m. turn on the morning of March 11, 1944, when the caboose in which plaintiff was riding at the forward end of the movement, delayed at a switch on the main lead track shortly after leaving the cinder dump.

When plaintiff's crew left the blast furnaces on the trip

in question the engine was at the forward end of the movement, backing up, pulling nine ladles and a caboose. At the "run-around," about four miles from the blast furnaces, the ladles were switched so that the engine was in the middle of the train, four ladles to the west and five ladles and the caboose to the east. The train was then moved westward from the "run-around" over the main lead track. Although there is some discrepancy in the record as to the number and designations of the various tracks, it appears fairly clear from the evidence that as the cut of ladles moved west from the "run-around" over the main lead track it passed over several switches en route to the cinder dump.

Plaintiff's testimony reflects a confused recollection as to the exact location of the accident and the switch and track involved. However, in so far as his testimony is not at variance with that of Allen R. Davis, the engineer the night of the accident and one of plaintiff's witnesses, Thompson's version of the occurrence is as follows. After leaving the "run-around" on the third trip westward to the dump, the cut of ladles stopped at 66-C switch, plaintiff left the caboose at the rear end of the cut, walked up to the head and there threw the switch from red to green, which lined the track for the movement off the main lead track to 66 cinder dump. The cut then moved up on 66 cinder dump where the ladles were dumped, an operation requiring almost an hour. While this was being done, plaintiff got out of the caboose and made a record of the number of the ladles. During all the time that he was up on the dump he was within sight of the switch he had thrown, which was not turned at any time but remained green. Leaving the dump the caboose was at the head end of the movement. Plaintiff rode the leading platform of the caboose as they came down from

in question the engine was at the forward end of the movement, backing up, pulling nine ladies and a caboose. At the "turn-around," about four miles from the blast furnaces, the ladies were switched so that the engine was in the middle of the train, four ladies to the west and five ladies and the caboose to the east. The train was then moved westward from the "turn-around" over the main lead track. Although there is some discrepancy in the record as to the number and designations of the various tracks, it appears fairly clear from the evidence that as the cut of ladies moved west from the "turn-around" over the main lead track it passed over several switches en route to the cinder dump.

Plaintiff's testimony reflects a confused recollection as to the exact location of the accident and the switch and track involved, however, in so far as his testimony is not at variance with that of Allen R. Davis, the engineer the night of the accident and one of plaintiff's witnesses, Thompson's version of the occurrence is as follows. After leaving the "turn-around" on the third trip westward to the dump, the cut of ladies stopped at 66-2 switch, plaintiff left the caboose at the rear end of the cut, walked up to the head and there threw the switch from red to green, which lined the track for the movement off the main lead track to 66 cinder dump. The cut then moved up on 66 cinder dump where the ladies were dumped, an operation requiring almost an hour. While this was being done, plaintiff got out of the caboose and made a record of the number of the ladies. During all the time that he was up on the dump he was within sight of the switch he had thrown, which was not turned at any time but remained green. Leaving the dump the caboose was at the head end of the movement. Plaintiff rode the leading platform of the caboose as they came down from

the dump, and remained there until he was within 150 or 200 feet of the 66-C switch, which was still green. He then went into the caboose and sat down on the left or north side thereof, looking out of the window, from which he could plainly see the switches. As he approached switch 62 he saw that the color of that switch light was green. As the leading step of the caboose passed the switch, the light of which was still green, the caboose jumped the track, bounced along on the ties for about 300 feet, then swung to the south and turned over on its side. As it left the rails plaintiff tried to get out of the caboose, and when he reached the platform he was thrown from it and landed about 10 or 15 feet from the point where the caboose turned over. None of the ladles or the engine was derailed. He was taken back to the round house, from where a fellow-employee drove him to the mill hospital. There he was X-rayed, bandaged, and sent to Mercy Hospital in Gary, where he remained for four days, and was thereafter treated both at the mill hospital and at his home by his own doctor for a considerable period. Since no question is raised as to the amount of the verdict, it will be unnecessary to discuss the nature or extent of plaintiff's injuries.

Plaintiff charged general negligence in the maintenance and operation of defendant's cars and tracks, and alleged that while in the exercise of ordinary care for his own safety he was injured as a result of the derailment of the caboose in which he was riding. He presented his case on the theory that the doctrine of res ipsa loquitur was applicable to the facts. Defendant takes issue with this contention, and in support of its position first argues that the instrumentality which produced the injury was not under defendant's exclusive management and control, since the accident occurred within the plant

the dump, and remained there until he was within 150 or 200 feet of the 66-C switch, which was still green. He then went into the caboose and sat down on the left or north side thereof, looking out of the window, from which he could plainly see the switches. As he approached switch 62 he saw that the color of that switch light was green. As the leading stop of the caboose passed the switch, the light of which was still green, the caboose jumped the track, bounced along on the ties for about 300 feet, then swung to the south and turned over on its side. As it left the rails plaintiff tried to get out of the caboose, and when he reached the platform he was thrown from it and landed about 10 or 15 feet from the point where the caboose turned over. None of the ladies or the engine was derailed. He was taken back to the round house, from where a fellow-employee drove him to the mill hospital. There he was X-rayed, bandaged, and sent to Mercy Hospital in Gary, where he remained for four days, and was thereafter treated both at the mill hospital and at his home by his own doctor for a considerable period. Since no question is raised as to the amount of the verdict, it will be unnecessary to discuss the nature or extent of plaintiff's injuries.

Plaintiff charged general negligence in the maintenance and operation of defendant's cars and tracks, and alleged that while in the exercise of ordinary care for his own safety he was injured as a result of the derailment of the caboose in which he was riding. He presented his case on the theory that the doctrine of res ipsa loquitor was applicable to the facts. Defendant takes issue with this contention, and in support of its position first argues that the instrumentality which produced the injury was not under defendant's exclusive management and control, since the accident occurred within the plant

of the Carnegie-Illinois Steel Corporation, which owned the tracks, furnished the rail and supervised the removal of obstacles or obstructions along the roadbed in that area. However, it appears that in the first paragraph of his complaint plaintiff alleged that on the day in question defendant was a common carrier by steam railroad, and as such "it was in possession and control of various railroad tracks in the city of Gary, State of Indiana, especially the sets of tracks constituting what is known as the Railroad Yard of the said defendant in the said city of Gary," and that in its answer "defendant admits the allegations of paragraph 1." Hart v. Washington Park Club, 157 Ill. 9, Blade v. Site of Ft. Dearborn Bldg. Corp., 245 Ill. App. 484, and Independent Brewing Ass'n v. Schaller, 128 Ill. App. 533, are cited in support of the proposition that unless the instrumentality which produced the injury was not under defendant's exclusive management and control, the doctrine of res ipsa loquitur does not apply. In the Hart case plaintiff was injured at the Washington Park Race Track by a "run-away" horse and buggy. The declaration did not allege whether the horse which ran away belonged to the defendant or was in its keeping. The court having sustained a demurrer to the declaration, plaintiff stood by his pleading and an adverse judgment was entered against him. On appeal the court pointed out that the declaration failed to allege that the "run-away" horse which caused the injury was under the management or control of defendant or its servants. In the Blade case plaintiff was struck and injured while on the street by a plank or board which was alleged to have fallen from the scaffolding of a building in the process of construction. She charged general negligence and proceeded under the doctrine of res ipsa loquitur. The question arose whether

-5-

the instrumentality, or scaffolding, was under the control of defendants against whom judgment was rendered, and the court held that under the ruling in Chicago Union Traction Co. v. Jerka, 227 Ill. 95, and subsequent cases, the allegation as to the control of the instrumentality would be deemed admitted unless denied by special plea. In the Jerka case cited in the foregoing decision, the court held that in an action against a street-railroad company for injuries to a teamster occasioned by a car leaving the track and striking his wagon, allegations relating to the defendant's ownership of the road and cars "are matters of mere inducement, which do not require proof on the part of the plaintiff unless they are denied by a special plea," and in Pennsylvania Co. v. Chapman, 220 Ill. 428, followed in the Jerka decision, the court held that "by pleading only the general issue the defendant railroad company impliedly concedes that at the time of the alleged injury it was operating the particular line of road mentioned in the declaration and that the persons in charge of the trains were its servants." In the Schaller case the plaintiff's intestate, while varnishing defendant's tanks and using an extension light supplied by it, was killed as the result of an explosion that occurred in the course of the work. The appellate court found that while defendant furnished the lamp, it was under the control of plaintiff's intestate and his fellow-workers at the time of the explosion, and pointed out that the doctrine of res ipsa loquitur could not be applied unless the instrumentality causing the accident was under the control of the defendant or its servants.

Notwithstanding defendant's admission that it was in possession and control of the railroad tracks in question, it nevertheless sought to prove upon the trial that the Carnegie-Illinois Steel Corporation, in some degree or manner, shared

the instrumentality, or scaffolding, was under the control of defendants against whom judgment was rendered, and the court held that under the ruling in Chicago Union Traction Co. v. Jones, 227 Ill. 95, and subsequent cases, the allegation as to the control of the instrumentality would be deemed admitted unless denied by special plea. In the Jones case cited in the foregoing decision, the court held that in an action against a street-railroad company for injuries to a passenger occasioned by a car leaving the track and striking his wagon, allegations relating to the defendant's ownership of the road and cars "are matters of mere inducement, which do not require proof on the part of the plaintiff unless they are denied by a special plea," and in Pennsylvania Co. v. Chapman, 220 Ill. 426, followed in the Jones decision, the court held that "by pleading only the general issue the defendant railroad company implicitly concedes that at the time of the alleged injury it was operating the particular line of road mentioned in the declaration and that the persons in charge of the trains were its servants." In the Chapman case the plaintiff's intestate, while maintaining defendant's tacks and using an extension light supplied by it, was killed as the result of an explosion that occurred in the course of the work. The appellate court found that while defendant furnished the lamp, it was under the control of plaintiff's intestate and his fellow-workers at the time of the explosion, and pointed out that the doctrine of res ipsa loquitur could not be applied unless the instrumentality causing the accident was under the control of the defendant or its servants. Notwithstanding defendant's admission that it was in possession and control of the railroad tracks in question, it nevertheless sought to prove upon the trial that the Carnegie-Illinois Steel Corporation, in some other manner, shared

the maintenance of the tracks, but we think that under the authority of the foregoing decisions expressing the established rule of law in this state, it is estopped from raising the question of joint possession, control, maintenance and operation of the tracks. Moreover, several of its witnesses supported plaintiff's allegation as to the control of the properties in the following respects. W. J. Sloan, called as a witness on behalf of defendant, testified that "I contacted the only people who could do any work on the track, Howard Carlson, the supervisor of the track. He has full charge of the men who do the work," and when Carlson was called by defendant, he testified that he had been supervisor of track for the Elgin, Joliet and Eastern Railway Company since 1936, including the day of the accident, that he had charge of the foremen in that district whose duty it was to attend to the maintenance, repair and possible construction of the tracks, that he had several foremen under his charge, including one who supervised a section gang which kept the tracks in condition in that particular territory, and another foreman who supervised a gang which was charged with the duty of removing coke, debris or other foreign matter from the tracks in the vicinity of the switch stand. In addition to these two witnesses, Philip Maisenbacher testified that he had been employed by defendant as roadmaster for 26 years, charged with the duty of keeping the tracks in repair at all times. No evidence was adduced by any representative of the Carnegie-Illinois Steel Corporation to support defendant's contention as to joint maintenance, control and operation of the tracks. The contention as to joint control was apparently an afterthought. It could have been averred in defendant's answer, but no effort was made to interpose such defense until the cause was being tried. Under the

the maintenance of the tracks, but we think that under the authority of the governing decisions regarding the established rule of law in this state, it is established that the question of joint possession, control, maintenance and operation of the tracks. However, several of its witnesses supported plaintiff's allegation as to the control of the properties in the following respects. W. J. Egan, called as a witness on behalf of defendant, testified that "I contacted the only people who could do any work on the tracks, Howard Carlson, the supervisor of the track. He has full charge of the men who do the work," and when Carlson was called by defendant, he testified that he had been supervisor of track for the Great Northern Railway Company since 1930, including the day of the accident, that he had charge of the foreman in that district whose duty it was to attend to the maintenance, repair and possible construction of the tracks. That he had several foremen under his charge, including one who supervised a section gang which kept the tracks in condition in that particular territory, and another foreman who supervised a gang which was charged with the duty of removing coke, debris or other material from the tracks in the vicinity of the switch stand. In addition to these two witnesses, Philip E. Wheeler testified that he had been employed defendant as roadmaster for 25 years, charged with the duty of keeping the tracks in repair at all times. No evidence was introduced by any representative of the Carnegie-Illinois Steel Corporation to support defendant's contention as to joint maintenance, control and operation of the tracks. The contention as to joint control was apparently an afterthought. It could have been averred in defendant's answer, but no effort was made to introduce such defense until the cause was being tried. Under the

circumstances we think that this requisite element of the doctrine of res ipsa loquitur was sufficiently established.

It is next urged that plaintiff himself was in charge of the instrumentality which produced the injury. In view of the showing, both by the admission in the pleadings and the evidence, that the defendant was in possession and control of the railroad tracks, switches, caboose and train, this contention is utterly untenable. Plaintiff was merely a member of the crew, in charge of switching operations, and not of the instrumentality which caused the accident. Among the decisions urged in support of the instant contention, defendant cites Stankowski v. International Harvester Co., 180 Ill. App. 439, wherein plaintiff brought suit for injuries resulting from the use of a chisel in the course of his employment. The declaration there alleged that defendant furnished plaintiff a dangerous and defective chisel, made of poor material. The court found "as an ultimate fact that appellant [defendant] was not guilty of the negligence charged." Plaintiff had complete control of the chisel, which he held in his hand while working with it, and was the complete master of the instrument which he used. Consequently, since defendant had no control, as the court found, the doctrine of res ipsa loquitur did not apply. In Odum v. Corn Products Refining Co., 194 Ill. App. 200, also cited by defendant, the doctrine of res ipsa loquitur was held inapplicable to an action for the death of a foreman as the result of the explosion of a grain elevator of which he had charge, and the court stated that there could be no recovery where it did not appear that the explosion was caused by any negligence on the part of the defendant employer. In the remaining case cited by defendant, Dryden v. Western Pacific R. Co., 1 Cal. App. 2d 49, 36 Pac. 2d 394, plaintiff's intestate participated in putting

circumstances we think that this requisite element of the doctrine of res ipsa loquens was sufficiently established.

It is next urged that plaintiff himself was in charge of the instrumentality which produced the injury. In view of the showing, both by the admission in the pleadings and

the evidence, that the defendant was in possession and control of the railroad tracks, switches, carcase and train, this contention is utterly untenable. Plaintiff was merely a member of the crew, in charge of switching operations, and not of the instrumentality which caused the accident. Among the decisions urged in support of the instant contention,

defendant cites Stankowski v. International Harvester Co., 180 Ill. App. 439, wherein plaintiff brought suit for injuries resulting from the use of a chisel in the course of his employment. The declaration there alleged that defendant furnished

plaintiff a dangerous and defective chisel, made of poor material. The court found "as an ultimate fact that appellant [defendant] was not guilty of the negligence charged." Plaintiff had complete control of the chisel, which he held in his hand while working with it, and was the complete master of the instrument which he used. Consequently, since defendant had

no control, as the court found, the doctrine of res ipsa loquens did not apply. In Osman v. Corn Products Refining

Co., 194 Ill. App. 200, also cited by defendant, the doctrine of res ipsa loquens was held inapplicable to an action for the death of a foreman as the result of the explosion of a grain elevator of which he had charge, and the court stated that there could be no recovery where it did not appear that

the explosion was caused by any negligence on the part of the defendant employer. In the remaining case cited by defendant, Wynon v. Western Pacific R. Co., 1 Cal. App. 2d 49, 36 Pac. 2d 394, plaintiff's intestate participated in putting

back on the track a car which had been derailed. In discussing the question whether he was in charge of the instrumentality, the court said: "When the car was derailed, it became his duty either to attempt rerailment by the use of the frogs, assisted by his train crew and the section men, or to summon the aid of a wrecking crew. He chose to attempt the rerailment by the use of the equipment at hand. He supervised the placing of the frogs, and it was the deceased who gave the signal to proceed, and he himself chose his position on the inside of the curve and within the area of the car if it should fall. *** If, therefore, the servant who himself has control has been negligent, and thus brings about the accident, he cannot recover, for there can be no recovery by a servant against the master for his own wrong." In the case at bar, plaintiff was riding on the caboose, and while it was his duty to give a signal to start or stop, if necessary to throw switches, he had no control over the condition of the tracks, switches and other equipment which may have produced the accident. In the recent case of Whitaker v. Pitcairn et al., 351 Mo. 848, 174 S. W. 2d 163, plaintiff, as head brakeman, was riding on the locomotive of a train which was derailed, and the court held that "the fact that the plaintiff employee was operating or working with the instrumentality does not of itself necessarily forbid the application of the doctrine [of res ipsa loquitur]," and a verdict having been entered in conformance with that doctrine, the verdict and judgment of the trial court were affirmed.

Lastly it is urged, upon the assumption that the doctrine of res ipsa loquitur is applicable, that any presumption of negligence arising from the doctrine was successfully rebutted by defendant's evidence. In all the cases that have been called to our attention on this phase of the controversy,

back on the track a car which had been derailed. In dis-
 creting the question whether he was in charge of the car-
 stramentally, the court said: "When the car was derailed,
 it became his duty either to attempt retrenchment by the use
 of the frogs, assisted by his train crew and the section men,
 or to summon the aid of a wrecking crew. He chose to attempt
 the retrenchment by the use of the equipment at hand. He
 supervised the placing of the frogs, and it was the deceased
 who gave the signal to proceed, and he himself chose his
 position on the inside of the curve and within the area of
 the car at its slight fall. *** If, therefore, the servant
 who himself has control has been negligent, and thus brings
 about the accident, he cannot recover, for there can be no
 recovery by a servant against the master for his own wrong."
 In the case at bar, plaintiff was riding on the caboose, and
 while it was his duty to give a signal to start or stop, it
 necessary to throw switches, he had no control over the condi-
 tion of the tracks, switches and other equipment which may have
 produced the accident. In the recent case of Wheaton v.
Wheaton et al., 321 Mo. 348, 194 S. W. 2d 103, plaintiff, as
 head brakeman, was riding on the locomotive of a train which
 was derailed, and the court held that "the fact that the plain-
 tiff employee was operating or working with the instrumentality
 does not of itself necessarily forbid the application of the
 doctrine [of res ipsa loquatur], and a verdict having been
 entered in conformance with that doctrine, the verdict and
 judgment of the trial court were affirmed."
 Lastly it is urged, upon the assumption that the doctrine
 of res ipsa loquatur is applicable, that any presumption of
 negligence arising from the doctrine was successfully rebutted
 by defendant's evidence. In all the cases that have been
 called to our attention on this phase of the controversy,

the courts have held that the question of whether the defendant offered such explanation of the accident as to relieve itself of the presumption of negligence, was a question of fact for the jury. In Roberts v. Economy Cabs, Inc., 285 Ill. App. 424, the court pertinently observed: "Whether the maxim of res ipsa loquitur applies in a given case is a question of law, but whether the presumption arising when the maxim has been applied has been overcome by proof is a question of fact. The finding of that fact is for the jury. Chicago Union Traction Co. v. Newmiller, 215 Ill. 383; New York, C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40." Likewise, in Chicago City Ry. Co. v. Barker, 209 Ill. 321, where defendant sought to rebut the prima facie question of negligence raised by the occurrence of the accident, it sought to do so by showing that the motorman was thrown from the car by an electric shock which could not be anticipated or prevented, and therefore urged that it should not be held responsible because the car was not in anyone's control when it struck plaintiff's wagon, but the court held it was a question for the jury to determine whether the explanation of the accident sufficiently rebutted the presumption in question, and that the "credibility of such rebutting evidence is held by the authorities to be a question for the jury."

In this proceeding defendant first attempted to explain the derailment by claiming that the movement of the train was through a closed switch, but was unsuccessful in doing so, and then attempted to show that the caboose and train passed through a "spring switch," thereby causing the derailment. A "spring switch" was described by several witnesses as one which springs back into position after the passage of the train, but the evidence conclusively shows that there was no "spring switch" located anywhere near the scene of the accident. The

the courts have held that the question of whether the defendant offered such explanation of the accident as to relieve itself of the presumption of negligence, was a question of fact for the jury. In Roberts v. Economy Cabs, Inc., 287 Ill. App. 484, the court pertinently observed: "Whether the maxim of res ipsa loquitur applies in a given case is a question of law, but whether the presumption arising when the maxim has been applied has been overcome by proof is a question of fact. The finding of that fact is for the jury." Chicago Union Traction Co. v. Newmiller, 217 Ill. 383; New York, C. & St. L. Ry. Co. v. Blumenthal, 100 Ill. 41. Likewise, in Chicago City Ry. Co. v. Barker, 209 Ill. 321, where defendant sought to rebut the prima facie question of negligence raised by the occurrence of the accident, it sought to do so by showing that the motorman was thrown from the car by an electric shock which could not be anticipated or prevented, and therefore urged that it should not be held responsible because the car was not in anyone's control when it struck plaintiff's wagon, but the court held it was a question for the jury to determine whether the explanation of the accident sufficiently rebutted the presumption in question, and that the "credibility of such rebutting evidence is held by the authorities to be a question for the jury."

In this preceding defendant first attempted to explain the derailment by claiming that the movement of the train was through a closed switch, but was unsuccessful in doing so, and then attempted to show that the caboose and train passed through a "spring switch," thereby causing the derailment. A "spring switch" was described by several witnesses as one which springs back into position after the passage of the train, but the evidence conclusively shows that there was no "spring switch" located anywhere near the scene of the accident. The

other evidence adduced by defendant in rebuttal of the presumption of negligence consisted of testimony that the road-bed, switches, spikes and caboose were in good condition prior to the accident, and that no foreign matter or obstructions were present on the track which could have produced the derailment. One of the witnesses, W. J. Sloan, testified on cross-examination: "If this molten slag falls off the car and cools it is equivalent to stone. A chunk of it might cause a derailment if it was large enough and thick enough." Another witness, Jay Kreischer, testified on cross-examination that he was track foreman and made one inspection per week. In view of the fact that defendant was constantly moving numerous ladles of molten slag over these tracks, the drippings of which might have produced chunks of sufficient size and hardness to cause a derailment, a weekly inspection would hardly suffice to exculpate it from the charge of negligence. The evidence discloses that the engine and slag ladles were much heavier than the caboose, and it is conceivable that the difference in weight might cause the derailment of the caboose while passing over a slag deposit on the track or switch without derailing the engine and ladles. In addition to these circumstances, it should be noted that substantially all the witnesses were in defendant's employ, and under the instructions of the court it was within the province of the jury to determine their credibility, and to determine whether defendant's explanation of the derailment sufficiently rebutted the presumption of negligence.

As an additional ground for reversal it is urged that plaintiff was guilty of contributory negligence in that he violated company rules, one of which provided that "When cars are pushed by an engine, *** a trainman must take a conspicuous position on the leading car ***. Employee riding the leading car must maintain a sharp lookout ahead and regulate the movement

other evidence adduced by defendant in rebuttal of the presumption of negligence consisted of testimony that the road-bed, switches, spikes and spikes were in good condition prior to the accident, and that no foreign matter or obstructions were present on the track which could have produced the derailment. One of the witnesses, J. J. Green, testified on cross-examination: "It this motion also falls off the car and wheels it is equivalent to stone. A chunk of it might cause a derailment if it was large enough and thick enough." Another witness, Jay Kreischer, testified on cross-examination that he was track foreman and made one inspection per week. In view of the fact that defendant was constantly moving numerous loads of material over these tracks, the frequency of which might have produced a derailment of sufficient size and hardness to cause a derailment, a weekly inspection would hardly suffice to exclude it from the charge of negligence. The evidence discloses that the engine and also loaded cars were much heavier than the caboose, and it is conceivable that the difference in weight might cause the derailment of the caboose while passing over a slight deposit on the track or switch without derailing the engine and loaded cars. In addition to these circumstances, it should be noted that substantially all the witnesses were in defendant's employ, and under the instructions of the court it was within the province of the jury to determine their credibility, and to determine whether defendant's explanation of the derailment sufficiently rebutted the presumption of negligence.

As an additional ground for reversal it is urged that plaintiff's failure to establish a duty of contributory negligence in that he violated company rules, one of which provided that "When cars are pushed by an engine, a trainman must take a conspicuous position on the leading car *** Employees riding the leading car must maintain a sharp lookout ahead and regulate the movement

by proper hand signals," and another rule which provided that "Those giving signals must locate themselves so as to be plainly seen, and give them so that they can be plainly understood." It is argued that these rules were devised for the safety of the members of the crew; that one of the contingencies against which the rules sought to guard "is the very thing which the evidence in this record so unmistakably shows was the cause of this accident - running through a closed switch"; and that the violation of the rules constituted contributory negligence. Instruction No. 8 dealt with the subject matter of this contention. The court charged the jury that the burden of proof was upon the plaintiff "to prove in this case that at and shortly before the time of the accident complained of he was in the exercise of ordinary care and caution for his own safety, and if the plaintiff has failed to prove by a preponderance of the evidence that he was in the exercise of such ordinary care and caution for his own safety, then your verdict should be for the defendant." However, the jury was evidently of the opinion that plaintiff was not guilty of contributory negligence, and there is ample evidence to support this finding. The only two eyewitnesses, plaintiff himself and Davis, the engineer, testified that the switches were lined for the movement of their train. Plaintiff further stated that he watched the switch signals until they passed them, and that his view of the track was not obstructed at any time. Plaintiff's conduct did not constitute a violation of the rules because he did take a conspicuous position in the leading car and maintained a sharp lookout ahead, and there was no occasion for giving signals, if his and the engineer's testimony is to be believed that the switches were lined for the movement of the train and that the green signal indicated that it would be safe to go ahead. On oral argument defend-

by proper hand signals," and another rule which provided that "those giving signals must locate themselves so as to be plainly seen, and give them so that they can be plainly understood." It is argued that these rules were devised for the safety of the members of the crew; that one of the considerations against which the rules sought to guard "is the very thing which the evidence in this record so manifestly shows was the cause of this accident - running through a closed switch"; and that the violation of the rules constituted contributory negligence. Instruction No. 3 dealt with the subject matter of this contention. The court charged the jury that the burden of proof was upon the plaintiff "to prove in this case that at and shortly before the time of the accident complained of he was in the exercise of ordinary care and caution for his own safety, and that the plaintiff has failed to prove by a preponderance of the evidence that he was in the exercise of such ordinary care and caution for his own safety, then your verdict should be for the defendant." However, the jury was evidently of the opinion that plaintiff was not guilty of contributory negligence, and there is ample evidence to support this finding. The only two eyewitnesses, plaintiff himself and Davis, the engineer, testified that the switches were lined for the movement of their train. Plaintiff further stated that he watched the switch signals until they passed them, and that his view of the track was not obstructed at any time. Plaintiff's counsel did not constitute a violation of the rules because he did take a conspicuous position in the leading car and maintained a sharp lookout ahead, and there was no occasion for giving signals, if his and the engineer's testimony is to be believed that the switches were lined for the movement of the train and that the green signal indicated that it would be safe to go ahead. On oral argument defendant

ant's counsel argued that if plaintiff had been on the platform of the caboose he could have jumped and saved himself from injury, but this is purely conjectural because such a course of action might have resulted in equal or greater injuries.

It is next urged that plaintiff assumed the risk of injury from a derailment. Counsel argues that since this is an action at common law, the assumption of risk is a complete defense. On this point the court charged the jury as follows: "You are instructed that when the plaintiff entered the employ of the defendant railway company as a switchman or switch foreman on the hot-cinder run he assumed the ordinary and usual dangers and risks incident to the performance of the duties of that employment and if you believe from the evidence that the plaintiff was injured because of an ordinary and usual danger or risk incident to the performance of his duties as foreman of the hot-cinder run, in such case the plaintiff cannot recover." This was a correct statement of the law, but the jury was evidently of the opinion that the derailment was not the ordinary or usual risk assumed by plaintiff, and since that question is ordinarily one for the jury under the instructions of the court, we would not be warranted in holding otherwise. Worthey v. Cleveland C., C. & St. L. Ry. Co., 251 Ill. App. 585. In City of La Salle v. Kostka, 190 Ill. 130, the court said: "The law is, that the servant does not assume risks that are unreasonable or extraordinary; nor risks that are extrinsic to the employment; nor risks of the master's own negligence." In one of the cases cited, Wilson v. Daniels, 250 Mass. 359, 145 N. E. 469, it was held that "The burden of proving that the risks were assumed rests upon the defendant, and rarely can the court rule that it has been sustained." In view of the undisputed evidence that the movement for the

and a counsel argued that if plaintiff had been on the right
form of the cases he could have proved and saved himself
from injury, but this is purely conjectural because such a
course of action might have resulted in a trial on greater
difficulties.

It is next argued that plaintiff assumed the risk of
injury from a defendant. Counsel argues that since there is
an action at common law, the assumption of risk is a complete
defense. On this point the court charged the jury as follows:
"You are instructed that when the plaintiff enters the employ
of the defendant railway company as a switchman on a train
foreman on the hot-chinier may be assumed to be ordinarily and
usual dangers and risks incident to the performance of the
duties of that employment and if you believe from the evidence
that the plaintiff was injured because of an ordinary and

usual danger or risk incident to the performance of his duties
as foreman of the hot-chinier may, in such case the plaintiff
cannot recover." This was a correct statement of the law, but
the jury was evidently of the opinion that the defendant was
not the ordinary or usual risk assumed by plaintiff, and since
the question is ordinarily one for the jury under the circum-
stances of the case, it would not be wrong to instruct other-
wise. *Forney v. Cleveland & C. R. Co.*, 101 W. 111.

Ap. 502, in *City of Chicago v. People*, 111 W. 111, the
court said: "The law is, that the plaintiff does not assume
risks that are unreasonable or extraordinary; nor risks that
are extraneous to the employment; nor risks of the master's
own negligence." In one of the cases cited, *Wilson v. ...*
250 Mass. 300, 147 N. E. 400, it was held that the burden of
proving that the risks were unreasonable or extraordinary
and thereby over the court rule that it has been established.
In view of the established rule that the burden for the

train was clear, with switch signals properly lined, Thompson took no apparent chance by going into the caboose from which he could plainly observe the switch signals.

Criticism is made of several instructions offered by plaintiff and given by the court. One of these is an instruction predicated upon the doctrine of res ipsa loquitur. Holding as we do that the doctrine was applicable to the facts of the case, we think this instruction was entirely proper. Another instruction relates to the Indiana ~~Minimum~~ Crew Law, predicated upon chapter 58, section 6 of the Indiana Statutes, which provides in substance that it shall be unlawful for any carrier to engage in switching operations unless the train is manned by a crew of employees consisting of not less than one engineer, one fireman, one yard conductor or foreman, and two yard brakemen or helpers. Defendant argues that since no such statute was mentioned in plaintiff's complaint and the pleadings contained no averment of any failure to observe its provisions, it was prejudicial and confusing. Although the statute is not applicable, we cannot conceive of the instruction having so confused the jury as to prejudice the nature of the defense interposed. We have examined other instructions criticized by defendant but find that they were not so prejudicial as to warrant a reversal of the judgment.

From a careful examination of the record we believe the case was fairly tried. Holding as we do that the doctrine of res ipsa loquitur is applicable and finding no convincing reasons for reversal, we think the judgment should be affirmed. It is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

train was clear, with switch signals properly lined, and no
took no apparent chance by going into the caboose from which
he could plainly observe the switch signals.

Criticism is made of several instructions offered by

plaintiff and given by the court. One of these is in in-

struction proffered upon the doctrine of res ipsa loquitur.
Holding as we do that the doctrine was applicable to the facts
of the case, we think this instruction was entirely proper.

Another instruction relative to the Indiana Minimum Crew Law,
proffered upon chapter 38, section 6 of the Indiana statutes,
which provides in substance that it shall be unlawful for any
carrier to engage in switching operations unless the train is
manned by a crew of employees consisting of not less than one
engineer, one fireman, one yard conductor or foreman, and two
yard brakemen or helpers. Defendant argues that since no

such statute was mentioned in plaintiff's complaint and the
pleadings contained no averment of any failure to observe its

provisions, it was prejudicial and controlling. Although the
statute is not applicable, we cannot conceive of the instruction

having so confused the jury as to prejudice the nature of the
defense interposed. We have examined other instructions exhi-

bited by defendant but find that they were not so prejudicial
as to warrant a reversal of the judgment.

From a careful examination of the record we believe the
case was fairly tried. Holding as we do that the doctrine of

res ipsa loquitur is applicable and finding no convincing
reasons for reversal, we think the judgment should be affirmed.

It is so ordered.

JUDGMENT AFFIRMED.

Seaman and Sullivan, JJ., concur.

43443

JOHN H. THOMPSON,
Appellee,

v.

ELGIN, JOLIET and EASTERN
RAILWAY COMPANY, a corporation,
Appellant.

)
)
) APPEAL FROM SUPERIOR
)
) COURT, COOK COUNTY.

) 323 I.A. 846²
)

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while employed by defendant as foreman of a switching crew transporting ladles of hot slag from the blast furnaces of Carnegie-Illinois Corporation at Gary, Indiana to the dumping grounds on Lake Michigan. He brought an action at common law because the run was an intra-state movement, thus not constituting a cause of action under the Federal Employers' Liability Act (45 U.S.C.A., sec. 51 et seq.). Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$10,000.00, which we affirmed in an opinion filed May 29, 1946. Petition for rehearing was subsequently allowed.

Plaintiff charged general negligence in the maintenance and operation of defendant's cars and tracks, and alleged that while in the exercise of ordinary care for his own safety he was injured as a result of the derailment of the caboose in which he was riding. He presented his case on the theory that the doctrine of res ipsa loquitur was applicable to the facts, and we sustained that contention and held that the question whether the presumption of negligence arising from the doctrine was successfully rebutted by defendant's evidence was a question of fact for the jury, citing numerous Illinois decisions in support of the rule.

In its petition for rehearing defendant does not reargue

JOHN H. THOMPSON,
Appellee,
v.
EIGHT, TENTH and WESTERN
RAILWAY COMPANY, a corporation,
Appellant.

OPINION ON PETITION FOR REHEARING.

MR. JUSTICE WING DELIVERED THE OPINION OF THE COURT.

Plaintiff was injured while employed by defendant as foreman of a switching crew transporting loads of hot slag from the blast furnaces of Carnegie-Illinois Corporation at Gary, Indiana to the dumping grounds on Lake Michigan. He brought an action at common law because the train was an interstate movement, thus not constituting a cause of action under the Federal Employers' Liability Act (45 U.S.C.A., sec. 51 et seq.). Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$10,000.00, which was affirmed in an opinion filed May 29, 1946. Petition for rehearing was subsequently allowed.

Plaintiff charged general negligence in the maintenance and operation of defendant's cars and trucks, and alleged that while in the exercise of ordinary care for his own safety he was injured as a result of the derelict of the caboose in which he was riding. He presented his case on the theory that the doctrine of res ipsa loquitur was applicable to the facts, and we sustained that contention and held that the question whether the presumption of negligence arising from the doctrine was successfully rebutted by defendant's evidence was a question of fact for the jury, citing numerous Illinois decisions in support of the rule.

In its petition for rehearing defendant does not reargue

the contention advanced in its original briefs that the doctrine of res ipsa loquitur is inapplicable under the facts of this case, but confines itself solely to the proposition that the following instruction given at plaintiff's request constitutes reversible error: "The question of negligence is a question of fact for the jury to determine after considering all the evidence before them; and in this case, if the jury believe from a preponderance of the evidence that the defendant railroad company is guilty of negligence charged in the complaint, and that the plaintiff received the injuries complained of by reason of the negligence charged in the complaint, and while he, the plaintiff, was exercising ordinary care and caution for his own safety under all the circumstances of the case as shown by the evidence, then you should find the defendant railroad company guilty." Its counsel argue that this instruction required the jury to return a verdict against the defendant even though they found the derailment was an ordinary or usual risk assumed by the plaintiff, and they cite Montgomery Coal Co. v. Barringer, 218 Ill. 327, and several other decisions in support of the contention. In the Montgomery case the court evidently believed that a verdict for the defendant should have been directed on the ground that the plaintiff had assumed the risk of an obvious and open condition that caused the accident, and in view of the fact that the decision turned on that point, anything therein said about instructions would seem to be inapplicable to the facts in this proceeding. In Cromer v. Borders Coal Co., 246 Ill. 451, also cited by defendant, the court found that there was evidence tending to support the defense of assumed risk, and in Lake Street Elevated R. R. Co. v. Fitzgerald, 136 Ill. App. 281, the court expressly stated that if the case did not involve the question of assumption of risk, then the giving of an instruction similar to the one here under consideration would not be

the contention advanced in its original briefs that the doctrine of res ipsa loquitur is inapplicable under the facts of this case, but confines itself solely to the proposition that the following instruction given at plaintiff's request constitutes reversible error: "The question of negligence is a question of fact for the jury to determine after considering all the evidence before them; and in this case, if the jury believe from a preponderance of the evidence that the defendant railroad company is guilty of negligence charged in the complaint, and that the plaintiff received the injuries complained of by reason of the negligence charged in the complaint, and while he, the plaintiff, was exercising ordinary care and caution for his own safety under all the circumstances of the case as shown by the evidence, then you should find the defendant railroad company guilty." It is counsel argue that this instruction required the jury to return a verdict against the defendant even though they found the defendant was an ordinary or usual risk assumed by the plaintiff, and they cite Montgomery Coal Co. v. Bannister, 218 Ill. 327, and several other decisions in support of the contention. In the Montgomery case the court evidently believed that a verdict for the defendant should have been directed on the ground that the plaintiff had assumed the risk of an obvious and open condition that caused the accident, and in view of the fact that the decision turned on that point, anything therein said about instructions would seem to be inapplicable to the facts in this proceeding. In Gronow v. Rogers Coal Co., 146 Ill. 411, also cited by defendant, the court found that there was evidence tending to support the defense of assumed risk, and in Lake Street Elevated R. Co. v. Fitzgerald, 136 Ill. App. 281, the court expressly stated that if the case did not involve the question of assumption of risk, then the giving of an instruction similar to the one here under consideration would not be

erroneous.

In their reply to the petition for rehearing plaintiff's counsel cite two derailment cases in which the doctrine of res ipsa loquitur was held to be applicable. In Chicago Union Traction Co. v. Giese, 229 Ill. 260, the court held that all the elements of the accident were within complete control of the railway company, and observed that the result was so far out of the usual course of things that there could be no fair inference that it could have been produced by any other cause than negligence, and then continued as follows: "Experience and observation teach us that with proper care street cars will remain on the tracks. If this were not true, municipalities would not license them to use public streets. If, with proper construction and management, street cars cannot be kept upon their tracks, then the safety of the public would require that they be done away with altogether. It is a matter of common knowledge, however, that it is possible, by the exercise of ordinary care, to so construct and operate these conveyances that they will not leave the tracks, and when they do so and inflict an injury upon another who is lawfully in the street and free from contributory negligence, we think that no hardship is imposed upon these corporations to hold that such an injury is within the maxim res ipsa loquitur, and that proof of the injury, under the circumstances stated, will justify a verdict unless such prima facie case is met by proof showing that the company is not at fault." The same result was reached in Kanter v. St. Louis, Springfield & Peoria R. R. Co., 218 Ill. App. 565.

From the usual definition of the doctrine of res ipsa loquitur it is clear that the very factor and elements upon which the rule is invoked, point to the conclusion that a derailment of the type involved in this case is an unusual and

erroneous.

In their reply to the petition for restraining plaintiff's counsel cite two derailment cases in which the doctrine of res ipsa loquitor was held to be applicable. In Chicago Union Traction Co. v. Giese, 229 Ill. 200, the court held that all the elements of the accident were within complete control of the railway company, and observed that the result was so far out of the usual course of things that there could be no fair inference that it could have been produced by any other cause than negligence, and then continued as follows: "Experience and observation teach us that with proper care street cars will remain on the tracks. If this were not true, municipalities would not license them to use public streets. If, with proper construction and management, street cars cannot be kept upon their tracks, then the safety of the public would require that they be done away with altogether. It is a matter of common knowledge, however, that it is possible by the exercise of ordinary care, to so construct and operate these conveyances that they will not leave the tracks, and when they do so and inflict an injury upon another who is lawfully in the street and free from contributory negligence, we think that no hardship is imposed upon these corporations to hold that such an injury is within the maxim res ipsa loquitor, and that proof of the injury, under the circumstances stated, will justify a verdict unless such proof is met by proof showing that the company is not at fault." The court went on to hold in Center v. St. Louis, Springfield & Brownsville R.R. Co., 213 Ill. App. 265.

From the usual definition of the doctrine of res ipsa loquitor it is clear that the very factor and elements upon which the rule is invoked, point to the conclusion that a derailment of the type involved in this case is an unusual and

extraordinary occurrence which throws upon the defendant the duty of explaining the occurrence by the introduction of evidence negating want of due care upon its part, and this being so, it could in no event be considered as an ordinary and usual risk assumed by anyone. Under the circumstances, we think the premise upon which defendant's argument is predicated, namely, that the derailment in and of itself could have been found by the jury to be a usual and ordinary risk assumed by the plaintiff, is untenable because it is inconsistent with the doctrine of res ipsa loquitur, which we held in our original opinion to be applicable to the facts in this case.

Before the jury in this case could conceivably have found that plaintiff had assumed the risk of any dangerous condition or hazard which could have brought on the derailment, it would have had to appear that such dangerous condition or hazard, in addition to being an ordinary and usual risk, also had to be a dangerous condition known to plaintiff or one of which he could have known in the exercise of ordinary care. We held in our original opinion that there was no evidence as to the condition or causative factor which brought on the derailment, and therefore the jury would not have been justified under any instruction in finding that plaintiff had assumed the risk of such unknown cause or that the unknown cause was an ordinary or usual risk incidental to his employment. As a matter of fact there was no evidence of the proximate cause of the derailment. The condition that caused the caboose to leave the track could not be determined; neither was there a showing of any condition upon which plaintiff could conceivably have been held to assume any risk. Since there was no evidence in the record upon which the jury could have found that the plaintiff assumed any ordinary or usual risk incidental to his employment, and upon which the court

extraordinary occurrence which throws upon the defendant the duty of explaining the occurrence by the instruction of evidence negating want of due care upon its part, and this being so, it could in no event be considered as an ordinary and usual risk assumed by anyone. Under the circumstances, we think the premise upon which defendant's argument is predicated, namely, that the derailment in and of itself could have been found by the jury to be a usual and ordinary risk assumed by the plaintiff, is untenable because it is inconsistent with the doctrine of res ipsa loquitur, which we held in our original opinion to be applicable to the facts in this case.

Before the jury in this case could conceivably have found that plaintiff had assumed the risk of any dangerous condition or hazard which could have brought on the derailment, it would have had to appear that such dangerous condition or hazard, in addition to being an ordinary and usual risk, also had to be a dangerous condition known to plaintiff or one of which he could have known in the exercise of ordinary care. We held in our original opinion that there was no evidence as to the condition or causative factor which brought on the derailment, and therefore the jury would not have been justified under any instruction in finding that plaintiff had assumed the risk of such unknown cause or that the unknown cause was an ordinary or usual risk incidental to his employment. As a matter of fact there was no evidence of the proximate cause of the derailment. The condition that caused the caboose to leave the track could not be ascertained; neither was there a showing of any condition upon which plaintiff could conceivably have been held to assume any risk. Since there was no evidence in the record upon which the jury could have found that the plaintiff assumed any ordinary or usual risk incidental to his employment, and upon which the court

-5-

could have submitted the question of assumed risk to the jury, the omission of that element from the instruction was not in any wise erroneous.

We adhere to our original opinion and the conclusions reached therein. The judgment of the Superior court should therefore be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

could have admitted the question of assumed bias to the jury, the omission of that element from the instruction was not in any wise erroneous.

We adhere to our original opinion and the conclusions reached therein. The judgment of the Superior Court should therefore be affirmed, and it is so ordered.

JUDGMENT AT LAW.

Sullivan, P. J., and Scamman, J., concur.

43496

329 ILL. App

43

MELVIN S. NELSON, Assignee of
Gilbert Nelson,

Appellant,

v.

MARTIN POWROZNIK, MARY F. SACKLEY,
PIONEER TRUST & SAVINGS BANK, a
corporation, and ZENO CZESLAWSKI,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

329 I.A. 47

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by Melvin S. Nelson, assignee of Gilbert Nelson, against Martin Powroznik, Mary F. Sackley, Pioneer Trust & Savings Bank (hereinafter for convenience referred to as Pioneer Bank) and Zeno Czeslawski. Plaintiff's suit was based upon some 116 claims for legal services alleged to have been performed by his assignor. As to a majority of such claims all four defendants were alleged to be jointly liable as participants in a joint enterprise and Powroznik alone was alleged to be liable as to the balance of plaintiff's claims. Upon petition for summary judgment by three of the defendants, Powroznik, Sackley and Pioneer Bank, the trial court entered judgment on January 24, 1945 against the plaintiff and in favor of defendants Sackley and Pioneer Bank upon all the issues in the case and entered judgment against the plaintiff and in favor of the defendant Powroznik as to all except seven of plaintiff's claims, which seven claims against Powroznik were continued for subsequent trial in the Circuit court. Based on said judgments executions were ordered to issue against plaintiff for the recovery by said three defendants of their costs. Thus at and after the time plaintiff perfected his appeal herein from the aforesaid judgments, there remained pending and undisposed of in the trial court the question of the liability of the defendant Czeslawski.

WILVIN S. WILSON, Assignee of
 Gilbert Nelson,
 Appellant,
 v.
 MARTIN POWERNIK, ARY W. SACKLEY,
 and JENO GOSIAWSKI,
 Appellees.

W. PRESIDING JUDGE. This is a petition for summary judgment of the court. This action was brought by Wilvin S. Wilson, assignee of Gilbert Nelson, against Martin Powernik, Ary W. Sackley, Pioneer Trust & Savings Bank (hereinafter for convenience referred to as Pioneer Bank) and Jeno Gosiawski. Plaintiff's suit was based upon some life claims for local services alleged to have been performed by his assignor. As to a majority of such claims all four defendants were alleged to be jointly liable as participants in a joint enterprise and jointly liable alleged to be liable as to the balance of Plaintiff's claims. Upon petition for summary judgment by three of the defendants, Powernik, Sackley and Pioneer Bank, the trial court entered judgment on January 24, 1945 against the Plaintiff and in favor of defendants Sackley and Pioneer Bank upon all the issues in the case and entered judgment against the Plaintiff and in favor of the defense and Powernik as to all except seven of Plaintiff's claims, which seven claims against Powernik were continued for subsequent trial in the Circuit court. Based on said judgment execution were ordered to issue against Plaintiff for the recovery by said three defendants of their costs. Thus at and after the time Plaintiff perfected his appeal herein from the aforesaid judgment, there remained pending and undischarged in the trial court the question of the liability of the defendant Gosiawski

upon the alleged joint claims and also the seven claims of the plaintiff against the defendant Powroznik. Powroznik, Sackley and Pioneer Bank (hereinafter for convenience referred to as the defendants) filed a motion in this court to dismiss plaintiff's appeal. Said motion was reserved to hearing.

Defendants contend that the judgments entered by the trial court on January 24, 1945 were not final and appealable judgments and that the appeal should be dismissed.

Plaintiff's position is that his appeal is authorized by subsections 1 and 2 of section 50 of the Civil Practice act, hereinafter set forth, and that defendants' motion to dismiss same should be denied.

In the view we take of the motion to dismiss the appeal, it will be unnecessary to discuss the merits of the case.

Under section 77 of the Civil Practice act (par. 201, chap. 110, Ill. Rev. Stat. 1945) the right of appeal is limited to final judgments, orders or decrees and this limitation of the right of appeal under the Civil Practice act is the same in substance as that specified in section 91 of the Practice Act of 1907 (par. 91, chap. 110, Cahill's Ill. Rev. Stat. 1931).

It was the established rule prior to the enactment of the Civil Practice Act that there could be no review of a judgment or decree which disposed of a case as to one or more of the parties thereto but left it pending and undisposed of as to other parties. Such judgments and decrees were held to be interlocutory and not final because they did not dispose of the entire case and it was also the rule that to permit a review thereof would be to allow piecemeal appeals. (Thompson v. Pollansbee, 55 Ill. 427; Hoffman & Billings Mfg. Co. v. Haxton Steam Heater Co., 18 Ill. App. 484; Free v. Successful Merchant,

upon the alleged joint claims and also the seven claims of the plaintiff against the defendant "Kornik". The court, however, and Pioneer Bank (hereinafter for convenience referred to as the defendants) filed a motion in this court to dismiss the plaintiff's appeal. Said motion was reserved to hearing.

Defendants contend that the judgments entered by the trial court on January 24, 1945 were not final and no appellate judgments and that the appeal should be dismissed.

Plaintiff's position is that his appeal is authorized by subsections 1 and 2 of section 90 of the Civil Practice Act, hereinafter set forth, and that defendants' motion to dismiss same should be denied.

In the view we take of the motion to dismiss the appeal, it will be unnecessary to discuss the merits of the case.

Under section 77 of the Civil Practice Act (par. 301, chap. 110, Ill. Rev. Stat. 1945) the right of appeal is limited to final judgments, orders or decrees and this limitation of the right of appeal under the Civil Practice Act is the same in substance as that specified in section 91 of the Practice Act of 1907 (par. 91, chap. 110, Cahill's Ill. Rev. Stat. 1931).

It was the established rule prior to the enactment of the Civil Practice Act that there could be no review of a judgment or decree which disposed of a case as to one or more of the parties thereto but left it pending and undisposed of as to other parties. Such judgments and decrees were held to be interlocutory and not final because they did not dispose of the entire case and it was also the rule that to permit a review thereof would be to allow piecemeal appeals. (Thompson v. Tolanabee, 55 Ill. 427; Hoffman & Williams v. Co. v. Linton, 104 Ill. 404; Wren v. Wescott & Linton, 104 Ill. 404).

It was the established rule prior to the enactment of the Civil Practice Act that there could be no review of a judgment or decree which disposed of a case as to one or more of the parties thereto but left it pending and undisposed of as to other parties. Such judgments and decrees were held to be interlocutory and not final because they did not dispose of the entire case and it was also the rule that to permit a review thereof would be to allow piecemeal appeals. (Thompson v. Tolanabee, 55 Ill. 427; Hoffman & Williams v. Co. v. Linton, 104 Ill. 404; Wren v. Wescott & Linton, 104 Ill. 404).

342 Ill. 27, 30; and People v. Banks, 285 Ill. 137, 140.)

In the Thompson case the court said (p. 428):

"This was a bill filed in the circuit court of Cook county, by the plaintiff in error, against Edwin C. Larned, Charles Follansbee, Sally M. Follansbee, and others, for partition of certain real estate described in the bill.

"At the October term, 1869, of said court, the defendants, Charles Follansbee, and Sally M. Follansbee, by their solicitor, filed a demurrer to the bill, and, on the hearing the demurrer was sustained, and the bill dismissed as to Charles and Sally M. Follansbee. Nothing further appears to have been done in the cause in the circuit court, and so far as the record discloses, the cause is still pending there against the other defendants named in the bill.

"The complainant brings the cause to this court on error, with the record in the condition above stated.

"It is a well settled rule, that a writ of error will not lie, except to a final order of court. If the bill is dismissed as to one or more parties, the complainant can not prosecute a writ of error, until there has been a final disposition of the case as to all other parties. A cause can not be reviewed as to one party at one time, and as to another party at another time.

"It appearing that there has been no final order in this cause in the court below, the writ of error is dismissed, with costs."

In the Hoffman case the court said at p. 485:

"This was a bill in chancery, brought in the court below by the appellants against Henry T. Lally, Edward G. Asay and the Haxton Steam Heater Company. The latter filed a demurrer to the bill, which the court sustained, and entered an order dismissing the bill as to that defendant, but the case was left undisposed of as to the other two defendants. In that condition of the case the complainants appealed from that order. Appeal or error will not lie. The order was not final. Such a case can not be pending partly in this court and partly in the court of original jurisdiction at the same time. Nor can appellate courts be required to decide cases piecemeal. To do so would, in many cases, abrogate the rule requiring that in courts of equity all necessary parties must be before the court. Thompson v. Follansbee, 55 Ill. 427, is directly in point. The appeal should be dismissed."

But plaintiff contends that the established rule as to "piecemeal" appeals set forth in the foregoing cases was abrogated by the incorporation of subsections 1 and 2 of section 50 in the Civil Practice act when it was enacted.

Subsection 1 of section 50 (par. 174, chap. 110, Ill. Rev. Stat. 1945) provides in part as follows:

342 Ill. 2d, 30; and People v. Lewis, 235 Ill. 127, 140.)

In the Woffen case the court said (p. 428):

"This was a bill filed in the circuit court of Cook county, by the plaintiff in error, against Wm. C. Larned, Charles Wollanabee, Sally M. Wollanabee, and others, for partition of certain real estate described in the bill.

"At the October term, 1889, of said court, the defendants, Charles Wollanabee, and Sally M. Wollanabee, by their solicitor, filed a demurrer to the bill, and on the hearing the demurrer was sustained, and the bill dismissed as to Charles and Sally M. Wollanabee. Nothing further appears to have been done in the cause in the circuit court, and as far as the record discloses, the case is still pending there against the other defendants named in the bill.

"The complainant brings the case to this court on error, with the record in the condition above stated.

"It is a well settled rule, that a writ of error will not lie, except to a final order of court. If the bill is dismissed as to one or more parties, the complainant can not prosecute a writ of error, until there has been a final disposition of the case as to all other parties. A case can not be reviewed as to one party at one time, and as to another party at another time.

"It appearing that there has been no final order in this cause in the court below, the writ of error is dismissed, with costs."

In the Woffen case the court said at p. 427:

"This was a bill in chancery, brought in the court below by the appellants against Henry T. Lally, David C. Lally and the Hutton Estate Company. The latter filed a demurrer to the bill, which the court sustained, and entered an order dismissing the bill as to that defendant, but the case was left undisturbed as to the other two defendants. In that condition of the case the complainants appealed from that order. Appeal on error will not lie. The order was not final. Such a case can not be brought partly in this court and partly in the court of original jurisdiction at the same time. Nor can appellate courts be required to decide cases piecemeal. To do so would, in many cases, serve the rule requiring that in courts of equity all necessary parties must be before the court. Woffen v. Wollanabee, 235 Ill. 427, is directly in point. The appeal shall be dismissed."

The plaintiff contends that the established rule as to

"piecemeal" appeals set forth in the foregoing cases was abro-

gated by the incorporation of subsections 1 and 2 of section 20

in the Civil Practice Act when it was enacted.

"Subsection 1 of section 20 (part. 174, chap. 110, Ill.

Rev. Stat. 1905) provides in part as follows:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants *** and more than one judgment may be rendered in the same cause."

Subsection 2 of the same section provides:

"Any party aggrieved by any such judgment may have a review thereof as herein provided, even though said cause remains undisposed of as to other parties."

Plaintiff insists that the only reasonable construction the foregoing provisions are susceptible of is that, since more than one judgment may be rendered in the same case, appeals may be taken from separate judgments entered in a cause which dispose of all matters in issue between the parties to the judgment appealed from.

The precise question presented here as to the construction of subsections 1 and 2 of section 50 was considered and determined by the First Division of this court in Schoen v. Chicago Title and Trust Company, Appellate court Number 38831. In that case the original complaint was filed after the Civil Practice act went into effect. There the plaintiff sued upon six causes of action, each charging malfeasance by the defendants as either directors or officers of the Chicago Title and Trust Company and said company and fifteen of the individual defendants filed a written motion in the trial court to dismiss the amended complaint. This motion was sustained and a decree was entered dismissing the amended complaint for want of equity as to the Chicago Title and Trust Company and the aforesaid fifteen individual defendants. The decree also provided that said defendants recover their costs from the plaintiff. The plaintiff therein perfected an appeal from said decree which made no disposition of the case as to seven other individual defendants. No written opinion was filed in the Schoen case but after full argument by counsel representing the appellant and appellees therein this court allowed appellees' motion to dismiss

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants *** and more than one judgment may be rendered in the same cause."

Subsection 2 of the same section provides:

"Any party aggrieved by any such judgment may have a review thereof as herein provided, even though said cause remains undisposed of as to other parties."

Plaintiff insists that the only reasonable construction

the foregoing provisions are susceptible of is that, since more than one judgment may be rendered in the same case, appeals may be taken from separate judgments entered in a cause which dispose of all matters in issue between the parties to the judgment appealed from.

The precise question presented here as to the construction

tion of subsections 1 and 2 of section 70 was considered and determined by the First Division of this court in Chicago Title and Trust Company, Appellate court number 30831. In that case the original complaint was filed after the Civil Practice act went into effect. There the plaintiff sued upon six causes of action, each charging malfeasance by the defendants as either directors or officers of the Chicago Title and Trust Company and said company and fifteen of the individual defendants filed a written motion in the trial court to dismiss the amended complaint. This motion was sustained and a decree was entered dismissing the amended complaint for want of equity as to the Chicago Title and Trust Company and the respondents. The decrees also provided that said defendants recover their costs from the plaintiff. The plaintiff therein perfected an appeal from said decree which made no disposition of the case as to seven other individual defendants. No written opinion was filed in the Schoon case but after full argument by counsel representing the appellant and appellees therein this court allowed appellees' motion to dismiss

plaintiff's appeal. Appellant filed a petition for leave to appeal from said order of dismissal, which petition was denied by the Supreme court.

Walters v. Merc. Nat. Bank of Chicago, 380 Ill. 477, is the only case called to our attention which deals specifically with the effect of section 50 of the Civil Practice act upon the right of a party to appeal from a final determination against him by the trial court of the only issue in the case in which he was interested, where other issues remained pending and undisposed of as to other parties. In that case, on a complaint to construe several provisions of a will and trust agreement, involving numerous defendants, a decree was entered construing the last paragraph of a certain article of the will adversely to the appellant therein and providing: "that the subject matter of this Order is separate and distinct and not necessarily related to the other questions raised by the plaintiffs as to the proper construction of the other provisions of the said Last Will and Testament * * * and that the remaining questions involved in the construction of said Last Will and Testament should be and they will be disposed of by this Court in a decree to be presented to this Court at a later date."

There in dismissing on its own motion the appeal from a decree, which construed the only portion of the will in which the appellant was interested, the Supreme court said at pp. 485-6-7:

"A decree is final and appealable only where it terminates the litigation between all of the parties on the merits so that when it is affirmed the court below has only to proceed with its execution. The only exception is that a decree may be final and appealable even though incidental matters may be reserved for consideration and it directs a master to state an account. (Free v. The Successful Merchant, 342 Ill. 27.) In the above case it was said that a decree for accounting which fixed the rights of complainants as to some of the defendants but reserved, for further consideration, the question of the liability of other defendants, is merely interlocutory and may be reversed on an appeal from a final decree dismissing the complaint as to some of the defendants whose rights had not been determined and as to one defendant against whom the first decree was entered. To

plaintiff's appeal, the court filed a petition for leave to
appeal from said order of dismissal, which petition was granted
by the supreme court.

Alfaro v. Alfaro, 100 Cal. 477, 111 P. 477, 12
the only case called to our attention which is directly
with the effect of section 50 of the Civil Practice Act upon the
right of a party to appeal from a final determination against
him by the trial court of the only issue in the case in which
he is interested, where other issues are pending and un-
disposed of as to other parties. In that case, on a complaint
to construe several provisions of a will and trust agreement,
involving numerous defendants, a decree was entered containing
the last paragraph of a certain article of the will adversely to
the appellant therein and providing: "that the subject matter
of this Order is separate and distinct and not necessarily re-
lated to the other questions raised by the plaintiff as to the
proper construction of the other provisions of the said last
will and Testament * * * and that the remaining questions involved
in the construction of said last will and Testament should be and
they will be disposed of by this court in a decree to be presented
to this Court at a later date."

There in reliance on its own action the appeal from a
decree, which construes the only portion of the will in which the
appellant was interested, the supreme court said at pp. 477-478:

"A decree is final and appealable only when it terminates
the litigation between all of the parties in the matter so that
when it is affirmed the court is free to go on to proceed with its
execution. The only exception is that a decree may be final and
appealable even though it is not a decree as to all the parties
concerned and it directs a master to take an account. (Case
v. The Mercantile Bank, 100 Cal. 477, 111 P. 477.) In the above case it
was said that a decree for accounting which fixed the rights of
complaint as to some of the defendants and reserved for
further consideration the question of the liability of other
defendants, is appealable. It is not necessary that some
appeal from a final decree in a case be made as to some
of the defendants whose rights have not been determined and as to
one defendant against whom the decree was entered, so

the same effect is Sheaff v. Spindler, 339 Ill. 540; Rosenthal v. Board of Education, 239 id. 29; Dreyer v. Goldy, 171 id. 434; Bucklen v. City of Chicago, 166 id. 451. In this case the decree determined the rights of plaintiffs as against appellant, only. It left for future consideration all questions raised as between the plaintiffs and all other parties. * * * While it is true that section 50 of the Civil Practice act has somewhat liberalized the practice to the extent that more than one judgment or decree may be entered in a proper cause, it does not have the effect to authorize the court to construe a will by piecemeal and to enter separate decrees, at different times, construing separate provisions of the will and thus determining questions which a part, only, of the parties to the suit have raised and litigated. A will must be construed as a whole and, regardless of its provisions, no separate paragraph may be properly construed alone, leaving the construction of all other provisions open to future litigation and determination.

"If the practice followed in this case should be approved the litigation might be prolonged indefinitely. After the present appeal is disposed of the parties could litigate each of the other questions raised by the pleadings and the court could enter a decree on one of those questions, only, from which an appeal might be taken. After the disposition of that appeal, the other questions might be litigated and determined separately from which separate appeals could be taken successively. When all of the questions in issue were finally disposed of the construction of the will of J. Albert Roesch, Jr., deceased, would be found in a number of various separate decrees of the trial court and in as many opinions of this court as might be written on the separate appeals: A mere statement of this procedure condemns it. It would constitute a hearing of the cause not only in the trial court but in this court, by piecemeal, and by disconnected fragments. The practice cannot be approved.

"The decree from which this appeal was taken, not being a final decree, the appeal must be dismissed. The applicable provisions of the Civil Practice act, even if construed to authorize separate decrees to be entered in a case of this kind, do not make such decrees final until the termination of the litigation by the decision of all the questions and issues raised between all the parties to the suit. (Rogers v. Barton, 375 Ill. 611; McDonald v. Walsh, 367 id. 529.) When the case is thus disposed of any party feeling himself aggrieved may perfect an appeal from any and all orders entered. Until that time, all such orders are interlocutory and cannot be reviewed on appeal.

"The appeal is dismissed for the reason that the order appealed from is not a final order or decree, disposing of all questions and issues between all parties to the suit."

The appealing party in the Walters case would seem to have been in a more favorable position in so far as his right to appeal was concerned than ^{is} the appealing party in the instant case. There a decree was entered against appellant upon the only matter in issue between him and the appellees. In the instant case, while judgments were entered against the appealing

party in favor of the three defendants hereinbefore mentioned, there remained pending and undisposed of in the trial court matters in issue between appellant and one of said defendants, as well as between appellant and the fourth defendant.

Notwithstanding that the decree appealed from in the Walters case determined adversely to the appealing party the only issue therein in which he was interested, the opinion of the Supreme court in that case condemned in unmistakable language the practice of piecemeal appeals. As was stated in said opinion, "the applicable provisions of the Civil Practice act, even if construed to authorize separate decrees to be entered in a case of this kind, do not make such decrees final until the termination of the litigation by the decision of all the questions and issues raised between all the parties to the suit." We consider the conclusion reached by the Supreme court in the Walters case in its construction of section 20 of the Civil Practice act as binding on this court and, although the judgments appealed from in the case at bar were final in their nature as to the matters in issue between the parties to such judgments, they must be considered as interlocutory and no appeal may be taken therefrom until the determination of the litigation by the decision of all the questions and issues raised between all the parties to the suit. Accordingly, plaintiff's right of appeal from the judgments entered herein must be deferred until all the issues between all of the parties to this suit have been finally determined by the trial court.

Plaintiff asserts that "it would be an anomaly to hold that appellees could proceed with their executions immediately and plaintiff could not proceed with his appeal immediately." Since the judgments entered herein must be considered as interlocutory and there is no right of appeal therefrom until the case is disposed of in its entirety, the trial court will

party in favor of the three defendants was...
there remained possible and...
matters in issue between appellant and one of said defendants,
as well as between appellant and the fourth defendant.

Notwithstanding that the above appeared from the

trial case determined adversely to the appellant party the

only issue therein in which he was interested, the opinion of

the Supreme Court in that case concerned its jurisdiction in

regard the practice of placing appeals, as was stated in said

opinion, "the applicable provisions of the Civil Practice Act,

even if construed to authorize separate appeals to be entered

in a case of this kind, do not make such appeal "final" until the

termination of the litigation by the decision of all the parties

plaintiff and issues raised between all the parties to the suit.

It is considered the conclusion reached by the Supreme Court in the

trial case in the construction of section 100 of the Civil

Practice Act as binding on this Court and, therefore, the

appeal is taken from the case at law and is not in this

nature as to the matters in issue between the parties to the

litigation, they may be considered as interlocutory and no

appeal may be taken therefrom until the termination of the

litigation by the decision of all the parties and issues

raised between all the parties to the suit. Accordingly,

plaintiff's right of appeal from the judgment entered herein

must be deferred until all the issues between all of the

parties to this suit have been finally determined by the

trial court.

Plaintiff requests that it be held as an account to hold

that appellees could proceed with their business immediately

and plaintiff could not proceed with his appeal immediately.

Since the judgment entered herein must be considered as interlocutory and there is no right of appeal therefrom until the

issues between all the parties to this suit have been finally determined by the trial court.

-3-

perforce be required to stay the executions ordered to issue against plaintiff to enforce defendants' judgments for costs until all of the matters in issue between all of the parties are disposed of.

For the reasons stated herein defendants' motion to dismiss plaintiff's appeal is allowed and said appeal is dismissed.

APPEAL DISMISSED.

Friend, J. concurs.
Scanlan, J., took no part.

Therefore, be required to stay the proceedings ordered to issue
against Plaintiff in order to enforce defendant's judgment for costs
until all of the matters in issue between all of the parties
are disposed of.

For the reasons stated herein Defendant's motion to
dismiss Plaintiff's appeal is allowed and said appeal is
dismissed.

WITNESSETH

Friend, J. comes.
Asplain, J., took no part.

43597

HARRY STROIK,
Appellee,

v.

PRISCILLA STROIK,
Appellant.

44
A
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

329 I.A. 647²

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree which granted plaintiff, Harry Stroik, a divorce and which dismissed the counterclaim of his wife, Priscilla Stroik, for a divorce for want of equity.

The record discloses that in a prior proceeding instituted on June 11, 1943, Priscilla Stroik filed a complaint for separate maintenance against her husband and he filed a counterclaim for divorce. After the Honorable Joseph A. Graber heard the evidence in that case, he attempted to bring about a reconciliation of the parties. Stroik consented to a reconciliation with his wife but only on condition that his daughter, Bernida, who was then 19 years old and unmarried, must remain away from his home. Mrs. Stroik also agreed to a reconciliation but she insisted that her daughter be permitted to return home with her. After failing in his efforts to reconcile the parties, Judge Graber entered an order on December 7, 1943 dismissing for want of equity both the complaint of Priscilla Stroik for separate maintenance and the counterclaim of Harry Stroik for a divorce.

On December 16, 1944 Stroik filed his complaint in the instant case charging his wife with ^edisertion. She filed an answer denying the material allegations of the complaint and this cause proceeded to trial on March 24, 1945 before the Honorable William J. Lindsay on the complaint and answer.

43907

HARRY STROIK,
Appellee,

v.

PRISCILLA STROIK,
Appellant.

APPEAL FROM SUPERIOR COURT,

DOGE COUNTY.

88010-048

MR. PRESIDING JUDGE MULLINEA DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a decree which granted plaintiff, Harry Stroik, a divorce and which dismissed the counterclaim of his wife, Priscilla Stroik, for a divorce for want of equity.

The record discloses that in a prior proceeding instituted on June 11, 1943, Priscilla Stroik filed a complaint for separate maintenance against her husband, and he filed a counterclaim for divorce. After the honor Mr. Joseph J. Graber heard the evidence in that case, he attempted to bring about a reconciliation of the parties. Stroik consented to a reconciliation with his wife but only on condition that his daughter, Terrence, who was then 19 years old and unmarried, stay with him away from his home. Mrs. Stroik also agreed to a reconciliation but she insisted that her daughter be permitted to return home with her. After failing in his efforts to reconcile the parties, Judge Graber entered an order on December 7, 1943, dismissing for want of equity both the complaint of Priscilla Stroik for separate maintenance and the counterclaim of Harry Stroik for a divorce.

On December 15, 1944, Stroik filed his complaint in the instant case charging his wife with adultery. He filed an answer denying the material allegations of the complaint and this case proceeded to trial on March 24, 1945, before the Honorable William J. Lindsay on the complaint and answer.

Stroik testified in substance on direct examination that he and his wife were married February 17, 1920; that two children were born of their marriage, a daughter, Bernida, who was 20 years old and married, and a son, Harry I., who was 12 years old; that he and his wife owned the building in which they had lived prior to their separation in joint tenancy; that he was employed as a machinist at a salary of approximately \$50 a week; that throughout their married life he treated his wife "as good as I knew how"; that his wife left him on May 30, 1943 without any reason that he knew of; and that she had been "gone ever since."

He testified on cross-examination that he arrived at his home shortly before midnight on May 29, 1943, after having attended a "movie" theatre; that he was not intoxicated at that time; that he saw his wife in bed and got in with her; that that was "the first time I got my wife in bed, for * * * about three weeks and she was lying there, so I jumped in bed next to her and I no sooner got in there than she started kicking and scratching and everything else and my daughter just happened to come in and the screen door was hooked and she broke the screen door * * * she could not wait until I came and opened it * * * I told her I would open it"; that his wife was not screaming when his daughter "broke the screen door"; that he did not choke his wife or have his hands on her throat while they were in bed; that after his daughter entered the home he and his wife got out of bed; and that about 1:30 that morning, Decoration Day, 1943, his wife left home but that he did not chase her out or tell her to get out.

Paul E. Kofnik testified in Stroik's behalf that the latter lived alone for 18 or 19 months subsequent to May 30, 1943 but that he had no knowledge of the circumstances under which the parties separated.

Stroik testified in substance on direct examination that he and his wife were married February 17, 1940; that two children were born of their marriage, a daughter, Barbara, who was 20 years old and married, and a son, Jerry L., who was 12 years old; that he and his wife owned the building in

which they had lived prior to their separation in joint tenancy; that he was employed as a machinist in a factory or approximately \$20 a week; that throughout their married life he treated his wife "as good as I knew how"; that his wife left him on May 30, 1943 without any reason that he knew of; and that she had been "gone ever since."

He testified on cross-examination that he arrived at his home shortly before midnight on May 29, 1943, after having attended a "movie" theatre; that he was not intoxicated at that time; that he saw his wife in bed and not in with him; that that was "the first time I got my wife in bed, for about three weeks and she was lying there, so I jumped in bed next to her and I no sooner got in there than she started kicking and scratching and everything else and my daughter just happened to come in and the screen door was hooked and she broke the screen door * * * she could not wait until I came and opened it * * * I told her I would open it"; that his wife was not screaming when his daughter "broke the screen door"; that he did not choke his wife or have his hands on her throat while they were in bed; that after his daughter entered the home he and his wife got out of bed; and that about 1:30 that morning, "sometime between 1943, his wife left him out what he did not chase her out or tell her to get out."

Paul E. Stroik testified in Stroik's behalf that the latter lived alone for 18 or 19 months subsequent to May 30, 1943 but that he had no knowledge of the circumstances under which the parties separated.

Edwin Konzak also testified in Stroik's behalf and his testimony was to the same effect as that of Kofnik.

Priscilla Stroik testified in her own behalf that she returned to her home about 12:30 A.M. on May 30, 1943 after visiting her sister; that there was no one home and she went to bed; that she was aroused from a sound sleep by her husband getting into bed; that he insisted on having sexual intercourse with her and she said, "Please leave me alone and let me rest"; that he was drunk, cursed her repeatedly and said, "You do as I say"; that she tried to get up but could not; that she had not entirely recovered from a major goiter operation which had been performed about a year previously; that he took hold of her neck and caused her to cry and scream with pain; that she then heard her daughter at the front door of the apartment and said to her husband, "You locked her out"; that she heard her daughter say, "Dad, please open the door", and he said in response "You wait until I am good and damned ready * * * move out of here"; that when her daughter did get into the house plaintiff asserted that he was "the boss in this house" and ordered her and her daughter to leave; that she protested that he had put her out twice before and that "if you tell us to get out, I will never come back home again"; that her son was visiting with a boy friend and was not home that night; that her husband insisted that she "get out"; and that she and her daughter left after packing some of their clothing and arrived at her sister's home about 2:30 A.M.

Bernida Stroik Johnson testified that she was the daughter of the parties; that she had been out with her girl friend and arrived home about 12:30 A.M. on May 30, 1943; that she had a key for the front door; that that door was open but the screen door was hooked; that she knocked on the

Edwin Conzak also testified in Trovik's behalf and his

testimony was to the same effect as that of Trovik.

Priscilla Trovik testified in her own behalf and she

returned to her home about 12:30 A.M. on May 3, 1943. After

visiting her sister; that there was no one home and she

went to bed; that she was aroused from a sound sleep by her

husband getting into bed; that he insisted on having sexual

intercourse with her and she said, "Please leave me alone and

let me rest"; that he was drunk, cursed her repeatedly and

said, "You do as I say"; that she tried to get up but could

not; that she had not entirely recovered from a major pelvic

operation which had been performed about a year previously;

that he took hold of her neck and caused her to cry and

scream with pain; that she then heard her husband at the

front door of the apartment and said to her husband, "Don't

looked her out"; that she heard her husband say, "Well, please

open the door", and he said in response "Don't until I am

cool and I am ready * * * move out of here"; that when her

daughter did get into the house, Trovik testified that he

was "the boss in this house" and ordered her and her daughter

to leave; that she protested that he had put her out before

and that "if you tell me to get out, I will never come

back home again"; that her son was visiting with a boy friend

and was not home that night; that her husband insisted that

she "get out"; and that she and her daughter left after checking

some of their clothing and arrival at her sister's home about

2:30 A.M.

Terada Trovik Johnson testified that she was the

daughter of the parties; that she had been out with her girl

friend and arrived home about 12:30 A.M. on May 3, 1943;

that she had a key for the front door; that that door was

open but the screen door was hooked; that she knocked on the

screen door but nobody came to open it; that she then heard her mother crying and "starting to scream"; that she heard her mother say, "Let me go, let me go, you are hurting me, please"; that she "rattled the door knob trying to get in" and said, "Please let me in"; that her father said, "I will open the door when I get good and ready"; that her mother kept on screaming and her father persisted in his refusal to let her in; that "I pushed my fist through the screen door and opened the door from the inside, went in the house and my mother had just run out of the bedroom and was holding her throat and she was sobbing * * * my dad was raving and ranting * * * he was very intoxicated and he was just shouting and throwing his arm all over in every which direction and I had to hold my mother up * * * she could not even stand"; that her father "kept hollering that I had no business there, get the hell out of the house, just like that, to both of us"; that "he tried to push us all around, so he told us to get out * * * my mother told him it was the third time, third chance she have given him, and she would not come back if he insisted on it, so he said 'Get out, get out', so we packed up some things and got out"; and that she and her mother arrived at her aunt's house about 2:30 A.M.

Notwithstanding that plaintiff presented no evidence to rebut the testimony of his wife and daughter as to the circumstances under which Mrs. Stroik left her home at 1:30 on the morning in question, the trial judge announced that "he is entitled to a divorce on the testimony I have heard."

Counsel for plaintiff then stated, "As far as my client is concerned, he is willing to go back," and the chancellor said, "If she wants to make up, make their peace and he wants to take her back * * * it is up to them." The cause was continued for further hearing. Prior to the next hearing and

across door but nobody came to open it; that she then heard her mother crying and "starting to scream"; that she heard her mother say, "Let me go, let me go, you are hurting me, please"; that she "rattled the door and trying to get in" and said, "Please let me in"; that her father said, "I will open the door when I get good and ready"; that her father kept on screaming and her father persisted in his refusal to let her in; that "I dashed my fist through the screen door and opened the door from the inside, went in the house and my mother had just run out of the kitchen and was holding her throat and she was sobbing * * * my dad was crying and wailing

* * * he was very intoxicated and he was just screaming and throwing his arms all over in every kind of direction and I had to hold my mother up * * * she could not even stand; that her father kept believing that I had no business there, got the hell out of the house, just like that, so soon of it; that "he tried to push us all around, so he told us to get out * * * my mother told him it was the third time, that because she have given him, and she would not come back if he persisted on it, so he said 'Get out, get out', so we packed up some things and got out"; and that she and her mother arrived at her mother's house

about 2:30 A.M.

Notwithstanding that Plaintiff presented no evidence to rebut the testimony of his wife and answered as to the circumstances under which he, Petitioner left his home at 1:30 on the morning in question, the trial judge announced that he is entitled to a divorce on the testimony I have heard.

Counsel for Plaintiff then stated, "As far as my client is concerned, he is willing to go back," and the Chancellor said, "If she wants to make up, make their peace and he wants to take her back * * * it is up to them." The cause was continued for further hearing. Prior to the next hearing and

pursuant to leave granted by the court, Mrs. Stroik filed a counterclaim for divorce on the ground of extreme and repeated cruelty, alleging that one act of cruelty occurred on May 30, 1943 and another on Mother's Day in May, 1942. Plaintiff filed an answer to the counterclaim in which he denied both of the alleged acts of cruelty.

When the cause again came on for hearing on May 7, 1945, counsel advised the chancellor that he relied on the testimony theretofore given by Mrs. Stroik and her daughter as to the act of cruelty alleged to have been committed by plaintiff on May 30, 1943.

As to the other alleged act of cruelty Mrs. Stroik testified in substance that her goiter operation was performed in April, 1942; that when she was released from the hospital she went to the home of her sister because there was nobody in her own home to give her the attention she required; that her daughter accompanied her to her sister's home to help take care of her and her son remained with his father in the family home; that her condition did not permit her to go outdoors until Mother's Day in May, 1942, which was about a month after she went to her sister's home; that on that day she went to her home with her daughter to take her son to a "movie"; that his father refused to let the boy go with her; that at her direction her daughter went into the closet to get the boy's sweater; that plaintiff followed his daughter and cursed and beat her; that he told Bernida that "she doesn't belong in the house, she should get out of the house * * * there was so much cursing and screaming"; that the "draining tube" was still in her neck; that when she told her husband to stop beating Bernida, he "grabbed" her (Mrs. Stroik) by the neck, shook her and "pushed" her around; that she called the police who came and afforded her and the children protection while they left the home; that thereafter the two children

present to leave granted by the court, Mrs. Troik filed a counterclaim for divorce on the ground of extreme and repeated cruelty, alleging that one act of cruelty occurred on May 30, 1943 and another on Mother's Day in May, 1943. Plaintiff filed an answer to the counterclaim in which he denied both of the alleged acts of cruelty.

When the case came on for trial on May 1, 1944, counsel advised the plaintiff that he relied on the testimony theretofore given by Mrs. Troik and her daughter as to the act of cruelty alleged to have been committed by plaintiff on May 30, 1943.

As to the other alleged act of cruelty Mrs. Troik testified in substance that her father operation was performed in April, 1943; that when she was released from the hospital she went to the home of her sister because there was nobody in her own home to give her the attention and nursing that her daughter accompanied her to her father's home to help take care of her and her son; that when her father in the family home; that her conviction did not permit her to go outdoors until Mother's Day in May, 1943, which was about a month after she went to her sister's home; that on that day she went to her home with her daughter to take her son to a "movie"; that his father refused to let her go with her; that at her direction her daughter went into the street to get the boy's sweater; that plaintiff followed his daughter and cursed and beat her; that he told her that "she doesn't belong in the house, she should get out of the house" * there was so much cursing and screaming; that the "screaming tube" was still in her neck; that when she told her husband to stop beating her, he "grabbed" her (Mrs. Troik) by the neck, shook her and "punched" her again; that she called the police who came and afforded her and the children protection while they left the home; that thereafter the two children

lived with her until she effected a reconciliation with her husband in August, 1942, when she and the children went back to live with him; and that the family continued to live together until May 30, 1943.

The testimony of Bernida Stroik Johnson as to what occurred on Mother's Day in May, 1942 was in effect the same as her mother's.

Stroik then testified in substance that he did not strike his wife on Mother's Day in May, 1942 or on May 30, 1943; that he never choked or grabbed her by the neck; and that he never told her or his daughter to "get out."

When the cause came on for hearing on June 29, 1945 on plaintiff's motion for the entry of a decree in his favor, Mrs. Stroik was again called as a witness by her counsel and she testified at that time that she was "open to a reconciliation" with her husband. The chancellor ignored her testimony in this regard and entered the decree appealed from. The decree, in addition to granting plaintiff a divorce and dismissing defendant's counterclaim for want of equity, awarded Mrs. Stroik the custody of the boy, ordered plaintiff to pay \$10 a week for his support and provided for an equal division of the proceeds of the sale of the property owned by the parties in joint tenancy.

After carefully considering all the evidence in the record pertaining to plaintiff's charge of desertion against his wife, we are impelled to conclude that the finding of the trial court that she was guilty of desertion is against the manifest weight of the evidence.

Section 1 of the Divorce Act (par. 1, chap. 40, Ill. Rev. Stat. 1945) provides in part that where either party "has wilfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of one year * * * it shall be lawful for the injured party to

lived with her until she effected a reconciliation with her husband in August, 1942, when she and the children went back to live with him; and that the family continued to live together until May 30, 1943.

The testimony of Gertrude Johnson is to that effect that on Father's Day in May, 1942 was in effect the same as her mother's.

Strook then testified in substance that he did not strike his wife on Father's Day in May, 1942 or on May 30, 1942; that he never choked or grabbed her by the neck; and that he never told her or his daughter to "get out."

When the cause came on for hearing on June 25, 1942 on Plaintiff's motion for the entry of a decree in his favor, Mrs.

Strook was again called as a witness by her counsel and she testified at that time that she was "born to a reconciliation"

with her husband. The Chancellor removed her testimony in this regard and entered the decree of divorce. The decree, in addition to granting Plaintiff a divorce and dissolving the

ent's community for part of a year, awarded Mrs. Strook the custody of the boy, ordered Plaintiff to pay his usual for

his support and provided for an equal division of the proceeds of the sale of the property owned by the parties in joint

tenancy.

After carefully considering all the evidence in the record pertaining to Plaintiff's charge of battery against his wife, we are impelled to conclude that the finding of the trial court that she was guilty of battery is against the manifest weight of the evidence.

Section 1 of the Divorce Act (par. 1, Chap. 40, Ill. Rev. Stat. 1942) provides in part that where either party "has

willfully deserted or abandoned himself or herself from the husband or wife, without any reasonable cause, for the space

of one year * * * it shall be lawful for the injured party to

obtain a divorce * * *." It is undisputed that Stroik and his wife were living separate and apart for more than one year at the time he filed his complaint but it was still incumbent upon him to prove that on May 30, 1943 she wilfully deserted him without any reasonable cause.

Although, even according to Stroik, at least an hour elapsed between the time his daughter gained entrance to the home and 1:30 A.M., when his wife left, he made no attempt to explain what occurred during that interval. There is absolutely no explanation in his testimony as to why his wife left the home. His version seems to be that everything was serene, peaceful and quiet after he and his wife got out of bed and "she just left" without any reason that he knew of. It will be recalled that Stroik did not deny the testimony of his wife and daughter as to what occurred outside of the bedroom. They both testified that he was very angry, that he cursed them both, that he pushed them around and that he ordered them out of the home. They both further testified that Mrs. Stroik told her husband that if he insisted upon her leaving at that time she would not return to him again. It is true that at a later hearing plaintiff made the flat statement that he never told his wife or daughter to "get out" but he still failed to testify as to what occurred during the hour before his wife left or as to why she left.

Stroik's uncorroborated testimony that his wife "just left" and that he did not "know of" any reason he gave her to leave is unreasonable in itself. What happened between Stroik and his wife while they were in bed is merely incidental to the question of her alleged desertion. The fact that he was frustrated in his desire to have sexual intercourse with his wife because of her unwillingness and the untimely arrival of his daughter undoubtedly provoked him and aroused his temper.

obtain a divorce. It is a matter of fact that Troik and his wife were living separate and apart for more than one year. At the time he filed his complaint it was still incumbent upon him to prove that on July 10, 1943 she illegally deserted him without any reasonable cause.

Although, even according to Troik, at least a year elapsed between the time his daughter advised him of the home and 1:30 A.M., when his wife left, he made no attempt to explain what occurred during that interval. There is absolutely no explanation in his testimony as to why his wife left the home. His version seems to be that everything was serene, peaceful and quiet after he and his wife got out of bed and "she just left" without any reason being given at all. It will be recalled that Troik did not deny the testimony of his wife and daughter as to what occurred outside of the bedroom. They both testified that he was very angry, that he cursed them both, that he pushed them around and that he ordered them out of the home. They both further testified that Mrs. Troik told her husband that if he insisted upon her leaving as that time she would not return to his home. It is true that at a later hearing Plaintiff made the statement that he never told his wife or daughter to "get out" and he still failed to testify as to what occurred during the time before his wife left or as to why she left.

Troik's corroborative testimony that his wife "just left" and that he did not "know of" any reason for her to leave is unbelievable in itself. That happened between Troik and his wife while they were in bed is merely incidental to the question of her alleged desertion. The fact that he was frustrated in his desire to have sexual intercourse with his wife because of her unwillingness and the untimely arrival of his daughter undoubtedly provoked him and exposed his temper.

His frustration and resulting wrath are circumstances that tend to support the testimony of his wife and daughter that she (Mrs. Stroik) was ordered out of her home rather than to his testimony that she "just left." If plaintiff was as docile and gentle with his wife during the hour after they got out of bed as he tries to make it appear, it is highly improbable that she would leave her home in the dead of night and travel a long distance to her sister's home, which she reached about 2:30 in the morning.

We are also impelled to conclude that that portion of the decree dismissing Priscilla Stroik's counterclaim for divorce for want of equity is against the manifest weight of the evidence and that the ends of justice will be best served by a retrial of this case in its entirety.

There is another aspect of this case that merits serious consideration. As heretofore shown, both Stroik and his wife during the course of the proceedings in the trial court evidenced a willingness to be reconciled. At the conclusion of the original hearing on the complaint and answer Stroik's counsel stated that he was "willing to go back." While this offer was not accepted by his wife at the time it was made, it was never withdrawn and later in the proceedings and before the decree was signed and entered, she testified that she was "open to a reconciliation." The trial judge, as already shown, ignored her testimony in this regard and made no attempt to reconcile the parties. When Judge Graber attempted to bring about a reconciliation, his efforts failed because Stroik refused to permit his daughter to return home but that obstacle had been removed by reason of his daughter's marriage prior to the filing of the complaint in the instant case. The principle that the State has an interest in preserving and maintaining the marriage relationship is basic and well recognized and, where, as here,

His frustration and realization that the circumstances that tend to support the testimony of his wife and daughter that she (Mrs. Troik) was ordered out of her home rather than to his testimony that she "just left." It is highly probable that she gentle with his wife during the hour after they got out of bed as he tries to make it appear, it is highly probable that she would leave her home in the dead of night and travel a long distance to her sister's home, which she would do about 1:30 in the morning.

There are also implied to conclude that the position of the decree dismissing Patricia Troik's complaint for divorce for want of equity is against the marital right of the evidence and that the ends of justice will be best served by a reversal of this case in its entirety.

There is another aspect of this case that merits serious consideration. As heretofore shown, both Troik and his wife during the course of the proceedings in the trial court evidenced a willingness to be reconciled. At the conclusion of the original hearing on the complaint and answer, Troik's counsel stated that he was "willing to go back." While this offer was not accepted by his wife at the time it was made, it was never withdrawn and later in the proceedings and before the decree was signed and entered, she testified that she was "open to a reconciliation." The trial judge, as already shown, ignored her testimony in this regard and made no attempt to reconcile the parties. When Judge Graber attempted to bring about a reconciliation, his efforts failed because Troik refused to permit his daughter to return home but that obstacle had been removed by reason of his daughter's marriage prior to the filing of the complaint in the instant case. The principle that the State has an interest in preserving and maintaining the marriage relationship is basic and well recognized and, therefore, as here,

-9-

both parties indicated that they were not averse to a reconciliation, the chancellor should at least have attempted to effect same.

For the reasons stated herein the decree of the Superior court of Cook county is reversed in toto and the cause is remanded for a new trial.

DECREE REVERSED AND CAUSE
REMANDED.

Friend and Scanlan, JJ., concur.

both parties indicated that they were not aware of a record-
citation, the chancellor should at least have attempted to
effect same.

For the reasons stated herein the decree of the
Superior court of Cook County is reversed in toto and the
cause is remanded for a new trial.

WITNESSE MY HAND AND SEAL
THIS 10th DAY OF

Friend and Counsel, J., corner.

43749

329 I.A. 648

KATHERINE HEINZ,
Appellee,

v.

RADIO KEITH ORPHEUM WESTERN
VAUDEVILLE EXCHANGE, a cor-
poration, doing business as
THE PALACE THEATRE,
Appellant.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

329 I.A. 648

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by Katherine Heinz against "Radio Keith Orpheon, a corporation, doing business as The Palace Theatre," to recover damages for personal injuries alleged to have been received by her, while a patron of said theatre, as the result of the negligence of the defendant. The cause was tried before the court and a jury and a verdict was returned finding the defendant guilty and assessing plaintiff's damages at \$3,000. Defendant's motions for judgment notwithstanding the verdict and for a new trial were overruled. Then upon plaintiff's motion an order was entered by the trial court, which amended "the title of this cause to Katherine Heinz v. Radio Keith Orpheum Western Vaudeville Exchange, a corporation doing business as The Palace Theatre, to make the pleadings conform to the evidence adduced at the trial of said cause." After the entry of said order and on the same day, judgment for \$3,000 was entered against the substituted defendant, Radio Keith Orpheum Western Vaudeville Exchange, on the verdict which had been returned against "Radio Keith Orpheon" the original corporate defendant. The substituted defendant prosecutes this appeal.

Plaintiff filed her complaint on March 1, 1943 naming therein as the defendant, "Radio Keith Orpheon, a corporation, doing business as The Palace Theatre." The complaint alleged in substance that said defendant owned, operated and controlled the Palace Theatre; that she attended said theatre as a patron

ESTIMATED VALUE
\$100.00

V.

THIS IS TO CERTIFY THAT THE
FOLLOWING IS A TRUE AND
CORRECT COPY OF THE
ORIGINAL AS SUBMITTED
TO THE COURT.

IN THE COURT OF THE

COUNTY OF

3201 A. 348

BEFORE ME, the undersigned authority, on this day personally appeared

and acknowledged to me that he executed the foregoing instrument for the purposes and consideration therein expressed.

Given under my hand and seal of office this day of

at the County of

State of

Notary Public in and for the State of

My commission expires this day of

19

and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

verdict and for a new trial was everlastingly

on August 25, 1942; that the defendant "carelessly, negligently and improperly furnished one of the * * * aisles [of the theatre] with torn and uneven carpeting, without adequate and sufficient lighting facilities to illuminate the floors of the said aisles"; and that as a result of defendant's negligence she was caused to fall to the floor and thereby suffered serious and permanent injuries.

The original defendant's answer denied the allegations of the complaint, including the averment as to its ownership, operation and control of the Palace Theatre.

Frank B. Smith and Howard J. Curtin were the only witnesses whose testimony at the trial had any bearing on the question as to the ownership, operation and control of the theatre. Smith testified in behalf of the original defendant that he was the resident manager of the Palace Theatre when plaintiff was injured therein on August 25, 1942; that at that time the Palace Theatre was "owned, operated and maintained" by "The Chicago Orpheum Company, a corporation"; that such corporation continued to own and operate said theatre up to the time of the trial; that "the initials RKO stand for Radio Keith Orpheum Corporation"; that the latter corporation "is a distributing organization * * * we distribute our pictures and our entertainment through * * * the Radio Keith Orpheum Corporation."

Howard J. Curtin testified in plaintiff's behalf that on the morning of the day he was called as a witness, October 19, 1945, he observed that "the Palace Theatre above the canopy has a sign about fifteen feet long and about two feet wide, black background, with either white or silver letting 'RKO Palace.'"

During the course of the original defendant's argument for a new trial, plaintiff's counsel, apparently concluding that her action had not been brought against the proper defendant, orally moved that leave be granted her "to amend the title of

[illegible]

The original document is located in the possession of the Department of the Interior, Bureau of Land Management, Washington, D. C. The document is a letterhead memorandum dated 10/1/54, and is addressed to the Secretary of the Interior, from the Assistant Secretary for Land Management.

Frank J. Smith and Howard J. Smith were the only witnesses as to the ownership of the land and the building on the land. It is the evidence, however, and subject of the hearing, that the building is part of the original building and is not the original building of the United States and is not the original building of the United States and is not the original building of the United States.

During the course of the original defendant's testimony for a new trial, defendant's counsel, apparently believing that her action had not been successful in getting defendant, actually moved that issue be granted and to award the life of

the case to read: 'Katherine Heinz vs. The Radio Keith Orpheum, a corporation, doing business as the Palace Theatre,' or 'Chicago Radio Keith Orpheum, doing business as the Palace Theatre.'" Over the original defendant's objection the court allowed plaintiff's motion to amend the title of the cause and directed that a draft order be presented. In answer to a question asked by the original defendant's counsel at that time the court stated that "the Chicago Orpheum is the operator of the theatre" and indicated that that corporation was to be substituted as the defendant by the amending order. On January 16, 1946 plaintiff presented and the trial court entered the draft order heretofore referred to, substituting "Radio Keith Orpheum Western Vaudeville Exchange, a corporation, doing business as The Palace Theatre" as the defendant in lieu of the original defendant, "Radio Keith Orpheum, a corporation, doing business as The Palace Theatre." Also on January 16, 1946 the judgment appealed from was entered against the substituted defendant.

On January 24, 1946 appellant presented the following motion:

"Radio Keith Orpheum Western Vaudeville Exchange, a dissolved Illinois Corporation hereby enters its special and limited appearance for the sole purpose of objecting to the jurisdiction of this Court over it and the subject matter of this action and moves this Court:

"1. To vacate its order of January 16, 1946, amending the title of this cause to Katherine Heinz, vs. Radio Keith Orpheum Western Vaudeville Exchange, a Corporation, d/b/a The Palace Theatre and to vacate the judgment entered against it on January 16, 1946, in the sum of \$3,000.00 in favor of Katherine Heinz.

"2. To dismiss this suit as to it for the reason that the alleged cause of action arose on August 25, 1942; Radio Keith Orpheum Western Vaudeville Exchange, a dissolved Illinois Corporation was not named as a defendant in the suit at the time it was

filed on, to-wit, March 1, 1943, or at any time prior to this Court's order of January 16, 1946; that no summons was ever issued or served upon said defendant; that the plaintiff's alleged cause of action is barred by the Limitation Statute of the State of Illinois, for the reason that said plaintiff did not file her alleged cause of action against this defendant within two years of the date it accrued."

The foregoing motion was supported by the affidavit of David W. Mahane which set forth inter alia that "he was the registered agent of the Radio Keith Orpheum Western Vaudeville Exchange, a dissolved Illinois corporation, during the period of its corporate existence, until the date of its dissolution by the Secretary of State of the State of Illinois, * * * the 29th day of June 1945"; that "Radio Keith Orpheum Western Vaudeville Exchange * * * was not named as a defendant in the complaint filed herein by the plaintiff on March 1, 1943"; that "no amended complaint was ever filed by this plaintiff naming Radio Keith Orpheum Western Vaudeville Exchange * * * as a defendant"; that "no summons was ever served on the Radio Keith Orpheum Western Vaudeville Exchange * * * in this matter"; that "this is a cause of action for personal injuries allegedly sustained by the plaintiff on August 25, 1942, while in the Palace Theatre; that "no cause of action was asserted, no suit was filed against or no summons was issued or served upon Radio Keith Orpheum Western Vaudeville Exchange within two years following the date of August 25, 1942, on which date said alleged cause of action accrued to the plaintiff, as required by the Limitation Statute of the State of Illinois"; and that "the Radio Keith Orpheum Western Vaudeville Exchange * * * did not own, operate, manage or control the Palace Theatre * * * on August 25, 1942, or at any other time during the period of its corporate existence."

Notwithstanding that plaintiff filed no answer to appellant's foregoing written motion and that no counter affidavit was filed by

her or in her behalf, an order was entered by the trial court denying "the motion of Radio Keith Orpheum Western Vaudeville Exchange, a dissolved Illinois Corporation, appearing herein by special and limited appearance, to vacate the judgment entered against it herein and for dismissal of the suit as to it."

While other grounds for reversal are urged, we only deem it necessary to consider the contention of Radio Keith Orpheum Western Vaudeville Exchange, the substituted defendant, that "where a plaintiff is mistaken in the identity of the person against whom he has a cause of action it is not a case of misnomer and the Court will not permit all of the pleadings to be amended by substituting the name of a different party."

Plaintiff's answer to this contention is that "the plaintiff was mistaken not in the identity of the defendant, against whom a meritorious cause of action arose but merely misnamed said defendant, and the Court should have permitted the amendments correcting the name."

The record demonstrates on its face that there is no question of misnomer in this case and that plaintiff was mistaken as to the identity of the owner and operator of the Palace Theatre when her action was instituted against the original defendant, when the order was entered on her motion substituting the appellant as the defendant in lieu of the original defendant and when the judgment was entered against the substituted defendant.

A very unusual situation is presented here. Prior to January 16, 1946, when the amending order substituting the appellant as the defendant was entered, four other and different corporations had been mentioned as operator of the Palace Theatre at the time of pl jury therein.

As has been seen, Radio Keith Orpheon, the ant, was named in the complaint as the owner ar

theatre. In plaintiff's oral motion to amend she asserted that either "The Radio Keith Orpheum" or "Chicago Radio Keith Orpheum" operated the theatre and should therefore be substituted as the defendant. There was evidence in the record that tended to show that "The Chicago Orpheum Company" owned and operated the theatre when plaintiff was injured and, undoubtedly because of that evidence the trial judge indicated that the "Chicago Orpheum" should be named as the substituted defendant in the draft order which plaintiff's counsel was directed to prepare. Then plaintiff's counsel presented the draft amending order which the court entered, said order completely disregarded both of the corporations which she proposed in the alternative in her oral motion to substitute as the defendant, as well as the corporation which the trial judge directed counsel to substitute, and, as already shown, substituted as the defendant, the appellant, Radio Keith Orpheum Western Vaudeville Exchange, which was a complete stranger to the proceedings up to the very time the amending order was presented and entered. The name of the appellant corporation had not been theretofore even mentioned as the operator of the theatre or otherwise.

It will be recalled that plaintiff's alleged cause of action arose on August 25, 1942, that her complaint was filed against the original defendant on March 1, 1943 and that the appellant was not substituted as the defendant until January 16, 1946. When it is considered that no right of action was ever asserted and no summons was ever issued or served upon appellant and when it is further considered that appellant was not substituted as the defendant until more than two years after plaintiff's alleged cause of action accrued and that the record shows conclusively that appellant never owned nor operated the Palace Theatre, it is readily apparent that the trial court had no jurisdiction to order Radio Keith Orpheum Western Vaudeville Exchange substituted

as the defendant or to enter judgment against it.

In a feeble attempt to sustain the judgment plaintiff cites Pennsylvania Railroad Co. v. Sloan, 125 Ill. 72, and a line of similar decisions. In the Sloan case the court held (p. 77):

"The law undoubtedly is that, where the real party in interest and the one intended to be sued is actually served with process in the cause, even though under a wrong name, he must take advantage of the misnomer by plea in abatement in such suit; and, if he does not, he will be concluded by the judgment or decree rendered the same as if he were described by his true name."

There is no question but that the holding in the Sloan case correctly states the law but that rule has no application here. There is nothing in the record to indicate that appellant was "the real party in interest" as the operator of the theatre and "the one intended to be sued" and, even if there was, it was not "actually served with process in the cause."

In her effort to sustain the judgment plaintiff also cites a line of cases, including Cornwell v. Leiter Bldg. Stores, Inc., 259 Ill. App. 460. In the Cornwell case the court said (p. 463) quoting from Field's Inc. v. Evans (Ohio App.), 172 N. E. 702:

"Where a corporation holds itself out as the owner or proprietor of said beauty shop, located within its own store building, and apparently a part of its store, and a person comes to such store, goes in, and therefrom enters the beauty shop for the purpose of obtaining service, without knowledge that a third person is the owner and proprietor and has control of the beauty shop, but relying and having the right to rely wholly upon the holding out of such person or corporation, such corporation so holding itself out is liable for the actionable negligence of the operator in the beauty shop in giving treatments."

This is of course a correct statement of law but it is not applicable to the situation presented here as to the substituted defendant. It is true that plaintiff presented evidence that at the time of the trial there was a large sign on the Palace Theatre reading "RKO Palace" and that the initials RKO "stand" for "Radio Keith Orpheum." There was no evidence, however, that this or a similar sign was on the theatre at the time of plaintiff's injury in 1942. In any event, if the evidence concerning

... ..

and the following information is provided for each of the following:

to call a law, if it is not a law, it is not a law.

117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935.

[illegible]

There is no summary but the letter in the third case

...and no [unclear] ...

There is nothing to suggest that the authors of the *Journal of the American Medical Association* are not sincere in their desire to help the public. The *Journal* is a leading medical journal, and its authors are leading medical professionals. The *Journal* is a leading medical journal, and its authors are leading medical professionals. The *Journal* is a leading medical journal, and its authors are leading medical professionals.

How many of you will be able to do this?

FOR THE YEAR 1964, THE TOTAL OF THE ABOVE IS \$1,000.00.

...the

DATE OF BIRTH: 1940-01-01

... ..

[illegible]

1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China. This has been due to a variety of factors, including the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

[illegible]

Respectfully,
[Signature]

[Faint, illegible text at the bottom of the page]

[Faint, illegible text at the bottom of the page]

"I just" ...

100-443887-100

—at 10 to 12 miles out to sea, and the water is very shallow.

THE UNIVERSITY OF CHICAGO

the sign had any probative force it pertained to the original defendant against which it was offered and not to be substituted defendant. We repeat that there is no showing in the record that the appellant, Radio Keith Orpheum Western Vaudeville Exchange, ever owned or operated the Palace Theatre or held itself out as the owner or operator thereof.

The original defendant's answer denied that it owned or operated the theatre but in spite of this plain notice plaintiff's counsel took no steps to remedy this situation by ascertaining what corporation did operate the theatre. This plaintiff could readily have done, before her right of action was barred by the Statute of Limitations, by resorting to the deposition and discovery procedure provided for by the Civil Practice Act (par. 182, sec. 58, chap. 110, Ill. Rev. Stat. 1945.)

Since the appellant was never served with summons and plaintiff's cause of action was barred as to it by limitation when the amending order substituting it as defendant was entered, said order and the judgment based thereon were void because of the trial court's lack of jurisdiction to enter same. *R*

For the reasons stated herein the judgment of the Circuit court of Cook county and its amending order substituting Radio Keith Orpheum Western Vaudeville Exchange, a corporation, as the defendant in lieu of the original defendant are reversed.

JUDGMENT AND ORDER REVERSED.

Friend and Scanlan, JJ., concur.

the also has very considerable power of penetration in the soil.

The National Industrial Conference Board is pleased to sponsor the Institute for the Study of the Labor Market. The Institute is a non-profit organization which is devoted to the study of the labor market and to the promotion of research in this field. The Institute is located at 1234 Main Street, New York, N. Y. 10001. For more information, please contact the Institute at (212) 512-1234.

1,244

There are several other points to be noted in connection with this case. First, the fact that the defendant was a member of the Communist Party at the time of the commission of the crime is a material fact which should be taken into consideration by the jury. Second, the fact that the defendant was a member of the Communist Party at the time of the commission of the crime is a material fact which should be taken into consideration by the jury. Third, the fact that the defendant was a member of the Communist Party at the time of the commission of the crime is a material fact which should be taken into consideration by the jury.

2. 1900

For the reasons stated herein the payment of the dividend is hereby recommended to the stockholders of the company.

43467

In the Matter of the Estate of
CHARLES WM. KUHN, Deceased

FORREST T. DUSTIN, Receiver in
stockholders' liability suit
entitled "Paul M. Cocot, et al.
vs. Noel State Bank, a corporation,
et al.," Superior Court Case
No. 538490,

Appellant,

v.

GLADYS RUCKER LOHFF and HENRIETTA
ANNA WALLIN, Executrices of the
Estate of CHARLES WM. KUHN,
Deceased,

Appellees.

46
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

329 I.A. 648

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Forrest T. Dustin, receiver in a stockholders' liability suit entitled Paul M. Cocot et al. v. Noel State Bank, Superior Court case No. 538490, appeals from an order of the Circuit Court, where the matter had been heard on appeal from an order of the Probate Court, overruling all except one of his objections to an amended final report and account filed in the Probate Court of Cook County by Gladys Rucker Lohff and Henrietta Anna Wallin, executrices of the estate of Charles William Kuhn, deceased.

Charles William Kuhn had been a stockholder in the Noel State Bank. He died April 23, 1931, and letters testamentary were issued to his daughters as executrices on June 12, 1931. At the time of his death he was indebted to the bank in the sum of \$2030 on a note executed by him during his lifetime. This indebtedness and his liability as a stockholder were the only two obligations of the estate, aside from funeral expenses, costs of administration and attorneys' fees. On October 14, 1931 Dustin was appointed receiver in the stockholders' liability suit, and on June 6, 1932, which was approximately six days prior to the expiration of the time for filing claims against the estate, he joined the execu-

In the Matter of the Estate of
CHARLES WM. KUNN, Deceased

FOREST T. DUSTIN, Receiver in
stockholders' liability suit
entitled "Paul M. Gosco, et al.
vs. Noel State Bank, a corporation,
et al.," Superior Court Case
No. 238490,
Appellant,

v.

GLADYS HUCKER LOFT and HENRIETTA
ANNA WALLIN, Executrices of the
Estate of CHARLES WM. KUNN,
Deceased,
Appellees.

MR. JUSTICE FRIMM DELIVERED THE OPINION OF THE COURT.

Forest T. Dustin, receiver in a stockholders' liability
suit entitled Paul M. Gosco et al. v. Noel State Bank, Superior
Court case No. 238490, appeals from an order of the Circuit
Court, where the matter had been heard on appeal from an order
of the Probate Court, overruling all except one of his objections
to an amended final report and account filed in the Probate Court
of Cook County by Gladys Hacker Loftt and Henrietta Anna Wallin,
executrices of the estate of Charles William Kunn, deceased.

Charles William Kunn had been a stockholder in the Noel
State Bank. He died April 23, 1931, and letters testamentary were
issued to his daughters as executrices on June 12, 1931. At the
time of his death he was indebted to the bank in the sum of \$2030
on a note executed by him during his lifetime. This indebtedness
and his liability as a stockholder were the only two obligations
of the estate, aside from funeral expenses, costs of administra-
tion and attorneys' fees. On October 14, 1931 Dustin was appointed
receiver in the stockholders' liability suit, and on June 6, 1932,
which was approximately six days prior to the expiration of the
time for filing claims against the estate, he joined the execu-

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

329 I.A. 648

trices as defendants in the stockholders' liability suit then pending. The judgment for \$7500, which constitutes the receiver's claim against the estate, was not entered until July 11, 1935, and was revived seven years later.

After Kuhn's death on April 23, 1931, his widow received notice of the \$2030 indebtedness due the bank. Her daughter, Gladys Schutte (formerly Gladys Rucker Lohff), testified that "she [Mrs. Kuhn] became frantic," and after consultation with her children, paid the bank \$1030 on May 5, 1931, approximately twelve days after her husband died. The executrices did not qualify until June 12, 1931. In their first report and account they claimed a credit of \$2030 under the misapprehension that their mother had paid the full amount of the indebtedness, but when the receiver objected to the amount they filed the amended report and changed the amount to \$1030. The receiver objects to their taking credit for this payment, claiming that the widow paid it out of her own funds and that she never was reimbursed by the estate, and his counsel argue that the executrices should be surcharged not only for a pro rata portion of this payment to the bank but for the full amount of \$1030 since, as he contends, no portion thereof was paid by them. However, the record discloses that Gladys Schutte, the only witness who offered any evidence upon the subject, testified that her mother was reimbursed for all money advanced by her on the bank's claim when the estate was liquidated, and there is no countervailing proof. Kuhn's obligation to the bank was a valid existing claim which would have been recognized by the Probate Court, and therefore the court was fully justified in allowing the executrices credit for the payment thereof. The receiver's argument that the executrices paid or permitted to be paid a just debt of the estate before letters testamentary were issued to them, would

prices as defendants in the stockholders' liability suit then pending. The judgment for \$7500, which constitutes the receiver's claim against the estate, was not entered until July 11, 1935, and was revived seven years later.

After Kahn's death on April 23, 1931, his widow received notice of the 1930 indebtedness due the bank. Her daughter, Gladys Schutte (formerly Gladys Mosker Lohr), testified that "she [Mrs. Kahn] became frantic," and after consultation with her children, paid the bank \$1030 on May 5, 1931, approximately twelve days after her husband died. The executives did not qualify until June 12, 1931. In their first report and account they claimed a credit of \$2030 under the misapprehension that their mother had paid the full amount of the indebtedness, but when the receiver objected to the amount they filed the amended report and changed the amount to \$1030. The receiver objects to their taking credit for this payment, claiming that the widow paid it out of her own funds and that she never was reimbursed by the estate, and his counsel argues that the executives should be surcharged not only for a pro rata portion of this payment to the bank but for the full amount of \$1030 since, as he contends, no portion thereof was paid by them. However, the record discloses that Gladys Schutte, the only witness who offered any evidence upon the subject, testified that her mother was reimbursed for all money advanced by her on the bank's claim when the estate was liquidated, and there is no countervailing proof of Kahn's obligation to the bank was a valid existing claim which would have been recognized by the Probate Court, and therefore the court was fully justified in allowing the executives credit for the payment thereof. The receiver's argument that the executives paid or permitted to be paid a just debt of the estate before letters testamentary were issued to them, would

not have justified the Probate or Circuit Court in surcharging them with the amount if they reimbursed the widow for the outlay, because the rule is fairly well settled in this state that the acts of an executor in the line of his duty relate back to the date of the decedent's death upon the issuance of letters testamentary to him. Globe Accident Insurance Co. v. Gerisch, Adm., 163 Ill. 625; Mettler v. Warner, 243 Ill. 600. Nor is there any force in the argument that the payment made to the bank was of a preferential nature, since the executrices were obliged under the will and as a matter of law to pay the debts of the deceased, and when the payment was made Dustin had not even been appointed as receiver. He joined the executrices as defendants in the stockholders' liability suit on June 6, 1932, six days before the expiration of the year within which claims against the estate could be filed, and his claim was not reduced to judgment so that it could be considered a claim against the estate until July 11, 1935. Moreover, he was appointed for the sole purpose of collecting liabilities due to the bank and its creditors, and therefore he is not in a position to question a payment made to the bank as being preferential.

Another of the receiver's objections to the final report and account relates to the liquidation of certain stocks and securities which were held by the executrices until shortly after the receiver obtained judgment against them for \$7500 in 1935. The securities were then sold by order of the Probate Court, and that circumstance should be sufficient to safeguard the executrices against the contention that they ought to be surcharged for the difference between their inventory value and the amount for which they were sold, a difference approximating \$4500. In this connection it should be noted that up to the time the receiver obtained judgment against the executrices on July 11, 1935, no claims had been filed against the estate, and up to then the

not have justified the Probate or Circuit Court in surcharging them with the amount if they reimbursed the widow for the outlay, because the rule is fairly well settled in this state that the acts of an executor in the line of his duty relate back to the date of the decedent's death upon the issuance of letters testamentary to him. Globe Accident Insurance Co. v. Gerlach, 14 Ky. 163 Ill. 627; Matter v. Turner, 243 Ill. 600. Nor is there any force in the argument that the payment made to the bank was of a preferential nature, since the executors were obliged under the will and as a matter of law to pay the debts of the deceased, and when the payment was made Dastin had not even been appointed as receiver. He joined the executors as defendants in the stockholders' liability suit on June 6, 1932, six days before the expiration of the year within which claims against the estate could be filed, and his claim was not reduced to judgment so that it could be considered a claim against the estate until July 11, 1932. Moreover, he was appointed for the sole purpose of collecting liabilities due to the bank and its creditors, and therefore he is not in a position to question a payment made to the bank as being preferential.

Another of the receiver's objections to the final report and account relates to the liquidation of certain stocks and securities which were held by the executors until shortly after the receiver obtained judgment against them for \$7500 in 1932. The securities were then sold by order of the Probate Court, and that circumstance should be sufficient to safeguard the executors against the contention that they ought to be surcharged for the difference between their inventory value and the amount for which they were sold, a difference approximating \$4500. In this connection it should be noted that up to the time the receiver obtained judgment against the executors on July 11, 1932, no claims had been filed against the estate, and up to then the

decendent's heirs and legatees were the only interested parties. In the absence of any evidence showing that they had conducted private sales or had otherwise acted in bad faith in the sale of the stocks, the trial court sustained their course of conduct. When Kuhn died in 1931 we were in the throes of an economic depression, and the value of securities for several years thereafter was attended by considerable uncertainty. In attempting to support the receiver's theory that the executrices are liable for the depreciation in the value of the securities, his counsel cite In re Estate of Busby, 288 Ill. App. 500, decided by this division in 1937. There a bank was appointed executor, but that case is not at all applicable because it appeared from the evidence that the bank president overrode the judgment of all his subordinates, who felt that it was imperative that the securities of the estate be liquidated promptly, and ordered the securities to be held because it was his judgment that their value would become enhanced in the future. The executrices in this case cannot be placed in the same category as the bank, which was acting as professional executor in the Busby estate, and in the absence of any evidence of negligence, bad faith or collusion with respect to the sale of the stock listed in the inventory and sold by order of the Probate Court we must conclude that they acted as ordinarily prudent persons.

Another objection lodged by the receiver relates to the allowance of \$550 as attorneys' fees to several attorneys who successively represented the estate. The sale of stocks for less than their inventory value, the discrepancy in claiming a credit of \$2030 paid to the Noel State Bank when in fact only \$1030 had been paid, and the failure of the estate to dispose of a membership in the Medinah Country Club are cited as circumstances which would require the disallowance of any attorneys' fees. We have already discussed the first two instances; the

decendant's heirs and legatees were the only interested parties. In the absence of any evidence showing that they had conducted private sales or had otherwise acted in bad faith in the sale of the stocks, the trial court sustained their course of conduct. When Kninn died in 1931 we were in the throes of an economic depression, and the value of securities for several years thereafter was attended by considerable uncertainty. In attempting to support the receiver's theory that the executors are liable for the depreciation in the value of the securities, his counsel cited In re Estate of Waddy, 288 Ill. 400, decided by this division in 1937. There a bank was appointed executor, but that case is not at all applicable because it appeared from the evidence that the bank president overrode the judgment of all his subordinates, who felt that it was imperative that the securities of the estate be liquidated promptly, and ordered the securities to be sold because it was his judgment that their value would become enhanced in the future. The executors in this case cannot be placed in the same category as the bank, which was acting as professional executor in the Waddy estate, and in the absence of any evidence of negligence, bad faith or collusion with respect to the sale of the stock listed in the inventory and sold by order of the Probate Court we must conclude that they acted as ordinarily prudent persons.

Another objection lodged by the receiver relates to the allowance of \$750 as attorneys' fees to several attorneys who successively represented the estate. The sale of stocks for less than their inventory value, the discrepancy in claiming a credit of \$2030 paid to the Real Estate Bank when in fact only \$1030 had been paid, and the failure of the estate to dispose of a membership in the Redman Country Club are cited as circumstances which would require the disallowance of any attorneys' fees. We have already discussed the first two instances; the

remaining matter relates to the Medinah Country Club membership, which was inventoried as having a value of \$250. By an order entered February 16, 1933 leave was given to sell this membership for \$275, but the prospective purchaser evidently changed his mind, and no sale was made. The Medinah Country Club was a solvent institution, and the same reasons applicable to the sale of other securities would also apply to this asset of the estate. The receiver introduced no evidence of any misconduct or bad faith on the part of the executrices, and therefore we do not perceive why they should be surcharged for the value of this membership. The attorneys' fees were proper and reasonable.

A further objection to the final report and account relates to the value of the decedent's interest in real estate at 5237 Nevada avenue, Chicago, Illinois. The court sustained the objection, and the executrices have filed a cross-appeal. The facts pertaining to this transaction are as follows. The inventory filed September 1, 1931 listed this property as subject to a mortgage of \$6000, on which the decedent and his widow Ettie Kuhn were personally liable on an extension agreement. The property was sold subject to the mortgage and taxes through an escrow at the Chicago Title and Trust Company for a consideration of \$1500 by a deed dated September 8, 1934, executed by the widow and the heirs of the decedent, including the two daughters acting as executrices. The consideration received was not accounted for in the estate, but was used to pay a personal obligation of the widow. The executrices actively joined in negotiating this transaction. One of them signed the escrow agreement, and both directed the delivery of the proceeds of sale, a check in the amount of \$1000 and a note for \$500, to Roy M. Harmon, attorney for the estate, endorsed the check of the Chicago Title and Trust Company for \$1000, receipted for the proceeds of sale and consented to the delivery of both the check and the note to apply

remaining matter relates to the Madison Country Club membership, which was inventoried as having a value of \$250. By an order entered February 16, 1933 leave was given to sell this membership for \$275, but the prospective purchaser evidently changed his mind, and no sale was made. The Madison Country Club was a solvent institution, and the same reasons applicable to the sale of other securities would also apply to this asset of the estate. The receiver introduced no evidence of any misconduct or bad faith on the part of the executors, and therefore we do not perceive why they should be surcharged for the value of this membership. The attorneys' fees were proper and reasonable. A further objection to the final report and account relates to the value of the decedent's interest in real estate at 5237 Nevada Avenue, Chicago, Illinois. The court sustained the objection, and the executors have filed a cross-appeal. The facts pertaining to this transaction are as follows. The inventory filed September 1, 1931 listed this property as subject to a mortgage of \$6000, on which the decedent and his widow Etelle Krum were personally liable on an extension agreement. The property was sold subject to the mortgage and taxes through an escrow at the Chicago Title and Trust Company for a consideration of \$1500 by a deed dated September 8, 1934, executed by the widow and the heirs of the decedent, including the two daughters acting as executors. The consideration received was not accounted for in the estate, but was used to pay a personal obligation of the widow. The executors actively joined in negotiating this transaction. One of them signed the escrow agreement, and both directed the delivery of the proceeds of sale, a check in the amount of \$1000 and a note for \$500, to Roy M. Harmon, attorney for the estate, endorsed the check of the Chicago Title and Trust Company for \$1000, receipted for the proceeds of sale and consented to the delivery of both the check and the note to apply

on an indebtedness of their mother Ettie Kuhn. In their amended final report and account the executrices stated that this real estate was foreclosed by the holder of the trust deed, that a deficiency judgment was recovered against Ettie Kuhn, and that no value or consideration was received by the estate. The trial court found that the trust deed had not been foreclosed, but that the foreclosure proceeding had been dismissed by stipulation, and surcharged the executrices with \$1000, but not with the amount of the \$500 note which they received in part payment. It is urged in their behalf that collateral security does not become a part of the assets of the estate until the creditors' lien is discharged, but since the estate was insolvent the executrices should have taken steps to subject the interest of the decedent in the equity of redemption to the payment of claims. The court surcharged them with the sum of \$1000, but since the note for \$500 represented part of the payment they should have been surcharged with the entire amount of \$1500.

Lastly it is urged by the receiver that the executrices should be charged with interest at the rate of 10 per cent per annum for failure to make distribution of the assets of the estate within the time specified in chapter 3, paragraph 116, Cahill's Illinois Statutes 1931. The long delay in closing the estate was due in part to the fact that the judgment in the stockholders' liability suit did not become final until July 1935 and was revived seven years later. In addition to that the attorney of record for the estate died, and his successor was later inducted into the military service. The courts of this state have been reluctant to impose the statutory penalty suggested by the receiver except in cases where the circumstances of the particular case clearly demand such action. U. S. Rubber Co. v. Peterman, 119 Ill. App. 610. In the Peterman case it was held that the court has a large discretion upon this subject, and in the course

on an indebtedness of their mother Little Kuhn. In their amended final report and account the executors stated that this real estate was foreclosed by the holder of the first deed, that a deficiency judgment was recovered against Little Kuhn, and that no value or consideration was received by the estate. The trial court found that the trust deed had not been foreclosed, but that the foreclosure proceeding had been dismissed by stipulation, and surcharged the executors with \$1000, but not with the amount of the \$500 note which they received in part payment. It is urged in their behalf that collateral security does not become a part of the assets of the estate until the creditors' lien is discharged, but since the estate was insolvent the executors should have taken steps to subject the interest of the decedent in the equity of redemption to the payment of claims. The court surcharged them with the sum of \$1000, but since the note for \$500 represented part of the payment they should have been surcharged with the entire amount of \$1500.

Lastly it is urged by the receiver that the executors should be charged with interest at the rate of 10 per cent per annum for failure to make distribution of the assets of the estate within the time specified in chapter 3, paragraph 116, Cahill's Illinois Statutes 1931. The long delay in closing the estate was due in part to the fact that the judgment in the stockholders' liability suit did not become final until July 1935 and was revived seven years later. In addition to that the attorney of record for the estate died, and his successor was later indicted into the military service. The courts of this state have been reluctant to impose the statutory penalty suggested by the receiver except in cases where the circumstances of the particular case clearly demand such action. U. S. Rubber Co. v. Peterman, 119 Ill. App. 610. In the Peterman case it was held that the court has a large discretion upon this subject, and in the course

of the opinion it was said that "This statute charging executors with interest at the rate of ten per cent per annum is penal in its character, and before such a penalty is imposed upon them their liability must be clearly established. *Gilbert v. Bone*, 79 Ill. 343. *** The rule is that the executor will not be charged with interest unless he has used the money or unreasonably retained it after he ought to pay it over or ought to have accounted for it to the court. *Rowan v. Kirkpatrick*, 14 Ill. 10. Any stricter rule would not only be inequitable, but it would deter responsible and competent men from accepting such trusts."

For the reasons indicated the order of the Circuit Court overruling the receiver's objections to the amended final report and account is affirmed in all respects except in relation to the item of \$1500, and as to that the order is reversed and the cause remanded with directions that the executrices be surcharged not only with the \$1000 cash received from the sale of the Nevada avenue property, but also with the additional amount represented by the note for \$500 received in part payment; and the cross-appeal of the executrices with respect to that one objection, will be dismissed.

ORDER AFFIRMED IN PART AND REVERSED
IN PART AND CAUSE REMANDED WITH
DIRECTIONS; CROSS-APPEAL DISMISSED.

Sullivan, P. J., and Scanlan, J., concur.

of the opinion it was said that "this statute charging exors with interest at the rate of ten per cent per annum is penal in its character, and before such a penalty is imposed upon them their liability must be clearly established. Gilbert v. Foss, 79 Ill. 343. *** The rule is that the executor will not be charged with interest unless he has used the money or unreasonably retained it after he ought to pay it over or ought to have accounted for it to the court. Foss v. Kirkpatrick, 14 Ill. 10. Any stricter rule would not only be inequitable, but it would deter responsible and competent men from accepting such trusts."

For the reasons indicated the order of the Circuit Court overruling the receiver's objections to the amended final report and account is affirmed in all respects except in relation to the item of \$1500, and as to that the order is reversed and the cause remanded with directions that the executors be surcharged not only with the \$1000 cash received from the sale of the Nevada avenue property, but also with the additional amount represented by the note for \$500 received in part payment; and the cross-appeal of the executor with respect to that one objection, will be dismissed.

ORDER AFFIRMED IN PART AND REVERSED
IN PART AND CAUSE REMANDED WITH
DIRECTIONS; CROSS-APPEAL DISMISSED.

WILLIAM F. J. and GEORGE J. J. concur.

43589

MINNETTE MOSEL, a/k/a MURETTO
MOSELLE, a/k/a MRS. CHARLES
MOSEL,

Appellant,

v.

MORRIS TUCKER, d/b/a TUCKER FURS,
Defendant,

and

GLOBE AND RUTGERS FIRE INSURANCE
CO., a corporation,

Appellee.

47 A
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

329 I.A. 649

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On June 8, 1943 plaintiff delivered her Canadian beaver fur coat to the defendant Morris Tucker for storage, and when she requested the return thereof on November 9, 1943 Tucker was unable to deliver it to her, it having been either lost or stolen. The Globe and Rutgers Fire Insurance Company had issued a policy of insurance to Tucker, and plaintiff claims that she is an insured under this policy and entitled to be indemnified under its provisions. Accordingly she brought suit against both Tucker and the insurance company. Her claim against the insurance company is set forth in the additional third count of the statement of claim, which was dismissed by the court on motion of the insurance company on the ground that it did not show a privity of contract between plaintiff and the company. Suit against the other defendant, Morris Tucker, the furrier, is still pending, and the only question presented by this appeal is whether the court erred in sustaining the insurance company's motion to strike the additional third count and to dismiss the cause of action as to the company.

The policy in this case is called a Furriers' Customers Basic Policy, which contemplates a rider or riders

43589

MINNETTE MOSER, s/k/a MURIEL
MOSELY, s/k/a MRS. CHARLES
MOSELY,

Appellant,

v.

MORRIS TUCKER, d/b/a TUCKER FURS,
Defendant,

and

GLOBE AND BUTTERS FIRE INSURANCE
CO., a corporation,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

3291.A.649

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

On June 8, 1943 plaintiff delivered her Canadian
beaver fur coat to the defendant Morris Tucker for storage,
and when she requested the return thereof on November 9, 1943
Tucker was unable to deliver it to her, it having been either
lost or stolen. The Globe and Butters Fire Insurance Company
had issued a policy of insurance to Tucker, and plaintiff
claims that she is an insured under this policy and entitled
to be indemnified under its provisions. Accordingly she
brought suit against both Tucker and the insurance company.
Her claim against the insurance company is set forth in the
additional third count of the statement of claim, which was
dismissed by the court on motion of the insurance company
on the ground that it did not show a privity of contract
between plaintiff and the company. Suit against the other
defendant, Morris Tucker, the latter, is still pending, and
the only question presented by this appeal is whether the
court erred in sustaining the insurance company's motion to
strike the additional third count and to dismiss the cause
of action as to the company.

The policy in this case is called a 'Furriers'
Customers Basic Policy, which contemplates a rider or riders

of endorsement because it is the basis on which other policies are predicated. In respect to any obligation of the insurance company to the customer it is similar to a master policy under which certificates or other policies are or can be issued. It insures Morris Tucker, designated as the assured, for his "account and for account of customers hereinafter described" as bailee for property accepted by him for storage, and he becomes the assured while the property is in his custody when he issues a receipt under which he agrees to effect insurance on the property. The policy provides, among other things, for the records which he must keep and the reports which he is to make to the company, and also for a premium at the monthly rate of 7 cents per \$100.00 of the amount of risk. It is stipulated in the policy that "The Assured warrants that no certification, certificates or policies of insurance covering the property insured hereunder will be issued by or through the Assured other than in this Company, as authorized under the terms of this policy when so endorsed."

The Furriers' Customers Personal Policy Endorsement contemplates the issuance of policies to the customers themselves in the manner provided therein, and upon the issuance of a policy under its provisions to the customer it then for the first time operates for the account of the customer; and when such policy is issued and not before does the customer become an assured, giving him or her a right of action against the insurance company. The endorsement provides for the issuance of policies to the storage customer for a term not exceeding one year, under a form approved by the company and to be countersigned by the company's duly licensed agent, and also for the payment of a premium by the customer for such policy issued to him or her at the rate of 80 cents for \$100.00 per annum. From these

of endorsement because it is the basis on which other policies are predicated. In respect to any obligation of the insurance company to the customer it is similar to a master policy under which certificates or other policies are or can be issued. It

issues Morris Tucker, designated as the assured, for his "account and for account of customers hereinafter described" as bailee for property accepted by him for storage, and he becomes the assured while the property is in his custody when he issues

a receipt under which he agrees to effect insurance on the property. The policy provides, among other things, for the records which he must keep and the reports which he is to make to the company, and also for a premium at the monthly rate of 7 cents per \$100.00 of the amount of risk. It is stipulated in the policy that "The Assured warrants that no certification, certificates or policies of insurance covering the property insured hereunder will be issued by or through the Assured other than in this Company, as authorized under the terms of this policy when so endorsed."

The "Warrior's" Customer Personal Policy Endorsement contemplates the issuance of policies to the customers themselves in the manner provided therein, and upon the issuance of a policy under its provisions to the customer it then for the first time operates for the account of the customer; and when such policy is issued and not before does the customer become an assured, giving him or her a right of action against the insurance company. The endorsement provides for the issuance of policies to the storage customer for a term not exceeding one year, under a form approved by the company and to be countersigned by the company's duly licensed agent, and also for the payment of a premium by the customer for such policy issued to him or her at the rate of 40 cents for \$100.00 per annum. From these

provisions it appears that the furrier pays one premium for the risk which the insurance company assumes as to him as bailee, and when the customer becomes an assured, he or she is required to pay a premium for the policy issued to him or her.

There is no claim in this proceeding that a policy was issued to plaintiff under the provisions of this endorsement, nor is it claimed that any premium was paid or incurred by plaintiff. Consequently we think there was no consideration as the basis of any obligation by the insurance company to plaintiff. If any agreement was made between plaintiff and the furrier for the storage of her garment, such agreement cannot be deemed a consideration in the nature of a premium, making her an assured of the insurance company. These circumstances undoubtedly led the trial judge to strike the additional third count and dismiss the cause of action on the ground that there was no privity of contract between plaintiff and the insurance company. We think that the court's ruling was entirely sound. If plaintiff has any cause of action it is against the furrier whom she also sued, and not against the insurance company.

In an endeavor to support her claim against the insurance company plaintiff seeks to invoke the rule usually applicable to ocean marine policies effecting insurance in the name of the owner or "on account of whom it may concern," and her counsel argues that the policy in question is the same as such marine coverage. Soelberg v. Western Assurance Co., 119 Fed. 23, defines marine insurance as an insurance against risks connected with navigation to which a ship, cargo or other insurance interest in such property may be exposed during a certain voyage or a fixed period of time. Because the ownership of a vessel or cargo may change or be undisclosed during a part or the whole of a voyage, the practice developed of effecting insurance in the name of the owner

provisions it appears that the latter pays one premium for the risk which the insurance company assumes as to him as bailee, and when the customer becomes an assured, he or she is required to pay a premium for the policy issued to him or her.

There is no claim in this proceeding that a policy was issued to plaintiff under the provisions of this endorsement, nor is it claimed that any premium was paid or incurred by plaintiff. Consequently we think there was no consideration as the basis of any obligation by the insurance company to plaintiff. If any agreement was made between plaintiff and the latter for the storage of her garment, such agreement cannot be deemed a consideration in the nature of a premium, making her an assured of the insurance company. These circumstances undoubtedly led the trial judge to strike the additional third count and dismiss the cause of action on the ground that there was no privity of contract between plaintiff and the insurance company. We think that the court's ruling was entirely sound. If plaintiff has any cause of action it is against the latter whom she also sued, and not against the insurance company.

In an endeavor to support her claim against the insurance company plaintiff seeks to invoke the rule usually applicable to ocean marine policies effecting insurance in the name of the owner or "on account of whom it may concern," and her counsel argues that the policy in question is the same as such marine coverage. Goelberg v. Western Assurance Co., 119 Fed. 93, defines marine insurance as an insurance against risks connected with navigation to which a ship, cargo or other insurance interest in such property may be exposed during a certain voyage or a fixed period of time. Because the ownership of a vessel or cargo may change or be undivided during a part or the whole of a voyage, the practice developed of effecting insurance in the name of the owner

thereof or "on account of whom it may concern." Thus if the interest in the ship or cargo, which is unknown at the beginning of the voyage, becomes known during the course of the voyage, the policy covers the unknown or undisclosed owner, as well as any change of interest which occurs during the time specified in the policy. Such policies clearly express the intention of all the parties at the time the policy of insurance is taken out, as disclosed from a careful examination of the ocean marine cases cited by plaintiff; but even in some of the cases which her counsel cites, the courts held that a rider attached to the policy covering vessels, was controlling over inconsistent printed portions of the marine policy. Towell v. Globe and Rutgers Fire Insurance Company, 231 N.Y.S. 67; Hagan v. Scottish Insurance Company, 186 U. S. 423.

After a careful examination of the cases cited by plaintiff we are satisfied that decisions construing ocean marine policies are not applicable to the circumstances of this case. It is a fundamental principle of insurance law that the entire policy, the endorsement and the rider must be construed together to determine the intention of the parties. Old Colony Life Ins. Co. v. Hickman, 315 Ill. 304. The policy in this proceeding, together with the endorsement and rider attached thereto, expresses the clear intention of the parties that the complete policy, rider and endorsement would protect the customer only when the method prescribed in the endorsement was carried out by the issuance of an additional policy to the customer in the manner described in the master policy, and not before. Only in that way would plaintiff herself have a direct cause of action against the insurance company, and until then there would be no privity of contract between her and the insurance company which would afford a basis for recovery.

themselves or "on account of whom it may concern." Thus if the interest in the ship or cargo, which is unknown at the beginning of the voyage, becomes known during the course of the voyage, the policy covers the unknown or undisclosed owner, as well as any change of interest which occurs during the time specified in the policy. Such policies clearly express the intention of all the parties at the time the policy of insurance is taken out, as disclosed from a careful examination of the ocean marine cases cited by plaintiff; but even in some of the cases which her counsel cites, the courts held that a rider attached to the policy covering vessels, was controlling over inconsistent printed portions of the marine policy. Towell v. Globe and Rutgers Fire Insurance Company, 231 N.Y.S. 67; Hagan v. Scottish Insurance Company, 100 U.S. 423.

After a careful examination of the cases cited by plaintiff we are satisfied that decisions construing ocean marine policies are not applicable to the circumstances of this case. It is a fundamental principle of insurance law that the entire policy, the endorsement and the rider must be construed together to determine the intention of the parties. Old Colony Life Ins. Co. v. Hingham, 315 Ill. 304. The policy in this proceeding, together with the endorsement and rider attached thereto, expressed the clear intention of the parties that the complete policy, rider and endorsement would protect the customer only when the method prescribed in the endorsement was carried out by the issuance of an additional policy to the customer in the manner described in the master policy, and not before. Only in that way would plaintiff herself have a direct cause of action against the insurance company, and until then there would be no privity of contract between her and the insurance company which would afford a basis for recovery.

-5-

For the reasons indicated we are of opinion that the court properly struck the additional third count against the Globe and Rutgers Fire Insurance Company and entered judgment accordingly. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

For the reasons indicated we are of opinion that the
court properly struck the additional third count against the
Globe and Rutgers Fire Insurance Company and entered judgment
accordingly. The judgment is therefore affirmed.
JUDGMENT AFFIRMED.

Sullivan, P. J., and Geanlan, J., concur.

43677

In the Matter of the Estate of
MICHAEL P. BREEN, Deceased.

MARIE K. BREEN, Administratrix
of the Estate of Michael P.
Breen, Deceased,

Appellant,

v.

MARGUERITE F. BREEN,

Appellee.

48
329 I.A. 6501

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

A

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Marie K. Breen, hereinafter referred to as petitioner, administratrix of the estate of Michael P. Breen, deceased, filed a petition in the Probate Court for the discovery of property in the possession of Marguerite F. Breen (respondent) and for a citation against her. Trial in the Probate Court resulted in an order finding that the petitioner was entitled to the property claimed by her with the exception of several items which were described in the order. The Probate Court directed respondent to turn over to petitioner the property so found to belong to the estate. Respondent appealed to the Circuit Court of Cook County, where upon trial of the issues the court found that certain items set forth in the order of the Probate Court, which were there found to be the property of the estate, did not belong to it but were the property of the respondent, and entered an order setting forth the goods and chattels found by it to belong to the petitioner and respondent, respectively. Petitioner appeals from the order of the Circuit Court.

The facts essential to a consideration of the issues involved disclose that in 1929 Michael P. Breen constructed an apartment building at 227 North Grove avenue, Oak Park, Illinois. He was the head of a family consisting of himself,

323 I.A. 610

APPEAL FROM CIRCUIT

COURT, COOK COUNTY.

In the Matter of the Estate of
MICHAEL P. BREEN, Deceased.

MARIE K. BREEN, Administratrix
of the Estate of Michael P.
Breen, Deceased,

Appellant,

v.

MARGUERITE P. BREEN,

Defendant.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Marie K. Breen, hereinafter referred to as petitioner, administratrix of the estate of Michael P. Breen, deceased, filed a petition in the Probate Court for the discovery of property in the possession of Marguerite P. Breen (respondent) and for a citation against her. Trial in the Probate Court resulted in an order finding that the petitioner was entitled to the property claimed by her with the exception of several items which were described in the order. The Probate Court directed respondent to turn over to petitioner the property so found to belong to the estate. Respondent appealed to the Circuit Court of Cook County, where upon trial of the issues the court found that certain items set forth in the order of the Probate Court, which were there found to be the property of the estate, did not belong to it but were the property of the respondent, and entered an order setting forth the goods and chattels found by it to belong to the petitioner and respondent, respectively. Petitioner appeals from the order of the Circuit Court.

The facts essential to a consideration of the issues involved disclose that in 1929 Michael P. Breen constructed an apartment building at 227 North Grove Avenue, Oak Park, Illinois. He was the head of a family consisting of himself,

his wife and five children, including petitioner and respondent. When the building was completed the family moved into an apartment there, where they lived until the decedent's death on June 10, 1943. Respondent still resides there. The goods and chattels in question, with the exception of the Buick automobile and some household furnishings in deceased's summer home in Lake Geneva, Wisconsin, were located in the Oak Park premises and were used by the family.

The deceased's wife, Elizabeth T. Breen, became incompetent and subsequently died on February 3, 1944. Respondent was appointed conservatrix of her mother's estate on July 8, 1943, and on February 15, 1944 was appointed administratrix. On August 5, 1943 she filed an inventory under oath as conservatrix, wherein she listed certain chattels ("a one-third interest in certain household goods contained in the apartment located in the building at 227 N. Grove Ave., Oak Park, Ills.") as assets of her mother's estate. No estate of Michael P. Breen, deceased, had been opened at that time. The assets in the Oak Park home were seized by respondent and sequestered as the share of Elizabeth T. Breen in the estate of Michael P. Breen, deceased.

Subsequently, on February 24, 1944, respondent, acting as administratrix of her mother's estate, filed a final accounting, again listing a one-third interest in the household goods as assets in her mother's estate, and a bill of appraisement filed in said estate lists the several items so claimed. Thereafter, on August 23, 1944, petitioner was appointed administratrix of the estate of Michael P. Breen, deceased, and being unable to obtain the assets of the estate from respondent, she initiated these proceedings.

In addition to the controversy as to the ownership of numerous household goods and chattels located in the Oak Park

his wife and five children, including petitioner and respondent. When the building was completed the family moved into an apartment there, where they lived until the decedent's death on June 10, 1943. Respondent still resides there. The goods and chattels in question, with the exception of the Buick automobile and some household furnishings in decedent's summer home in Lake Geneva, Wisconsin, were located in the Oak Park premises and were used by the family.

The decedent's wife, Elizabeth T. Green, became incompetent and subsequently died on February 3, 1944. Respondent was appointed conservatrix of her mother's estate on July 8, 1943, and on February 12, 1944 was appointed administratrix. On August 2, 1943 she filed an inventory under oath as conservatrix, wherein she listed certain chattels ("a one-third interest in certain household goods contained in the apartment located in the building at 227 W. Grove Ave., Oak Park, Ill.") as assets of her mother's estate. No estate of Michael F. Green, deceased, had been opened at that time. The assets in the Oak Park home were seized by respondent and sequestered as the share of Elizabeth T. Green in the estate of Michael F. Green, deceased. Subsequently, on February 24, 1944, respondent, acting as administratrix of her mother's estate, filed a final accounting, again listing a one-third interest in the household goods as assets in her mother's estate, and a bill of appraisal filed in said estate lists the several items so claimed. Thereafter, on August 23, 1944, petitioner was appointed administratrix of the estate of Michael F. Green, deceased, and being unable to obtain the assets of the estate from respondent, she initiated these proceedings.

In addition to the controversy as to the ownership of numerous household goods and chattels located in the Oak Park

home which were seized by respondent, a dispute exists as to the ownership of a 1941 Buick automobile registered in the name of the deceased, as shown by the application for a certificate of title signed and sworn to by him during his lifetime and by John B. Mahoney as agent for the automobile company which made the sale. This car was also seized by respondent and is in her possession. Without going into detail as to the claim of ownership of the numerous chattels involved in this litigation it may be stated generally that respondent contends that some of the chattels in the Oak Park home were purchased by her either before or after her father's death, and are therefore her own chattels, and that others were given to her by her father during his lifetime. With respect to the claimed gifts inter vivos, respondent admits in her brief that the evidence "may not be entirely satisfactory," but relies on the finding of the trial judge as tending "to prove the issue."

As ground for reversal of the order of the Circuit Court it is first urged that the court refused to consider evidence offered by petitioner with respect to goods and chattels which the Probate Court found to be the property of the respondent. The following colloquy of court and counsel indicates the position of the court and the reason for his ruling:

"THE COURT: The Probate Court ruled upon it, and there is no appeal before me on that. If I am wrong on that law, I want to be shown. My impression is the law is that parties who have not appealed from the Probate Court order can have no relief from it. If you would have appealed, that would be tried fully. If the Probate Court says that property belongs to her [respondent], and certain property belonged to the estate, as far as I am concerned, that is final."

home which were seized by respondent, a dispute exists as to the ownership of a 1941 Buick automobile registered in the name of the decedent, as shown by the application for a certificate of title signed and sworn to by him during his lifetime and by John B. Mahoney as agent for the automobile company which made the sale. This car was also seized by respondent and is in her possession. Without going into detail as to the claim of ownership of the numerous chattels involved in this litigation it may be stated generally that respondent contends that some of the chattels in the Oak Park home were purchased by her either before or after her father's death, and are therefore her own chattels, and that others were given to her by her father during his lifetime. With respect to the claimed gifts inter vivos, respondent admits in her brief that the evidence "may not be entirely satisfactory," but relies on the finding of the trial judge as tending "to prove the issue."

As ground for reversal of the order of the Circuit Court it is first urged that the court refused to consider evidence offered by petitioner with respect to goods and chattels which the Probate Court found to be the property of the respondent. The following colloquy of court and counsel indicates the position of the court and the reason for his ruling:

"THE COURT: The Probate Court ruled upon it, and there is no appeal before me on that. If I am wrong on that law, I want to be shown. My impression is the law is that parties who have not appealed from the Probate Court order can have no relief from it. If you would have appealed, that could be tried fully. If the Probate Court says that property belongs to her [respondent], and certain property belonged to the estate, as far as I am concerned, that is final."

"MR. STEERS [Petitioner's counsel]: I can see where you arrive at a situation that would be highly detrimental to the one who did the appealing. Suppose in trying this de novo he should ask for and prove that he was entitled to the property?

"THE COURT: Let's analyze this. Suppose there is a piano, phonograph and automobile, and the Probate Court holds the automobile belongs to her; the phonograph and the piano belong to the other person. He appeals from the automobile. You do not appeal from the other two. That is an adjudication. There is nothing de novo about it. Those items are disposed of. I only review that which is before me on the appeal.

"MR. STEERS: I disagree with your Honor on that. I am going to look it up.

"THE COURT: If the Probate Court held on the property and then the Probate Court adjudicated it in her favor, there is only one thing to do, perfect your appeal. You did not."

Section 333 of the Probate ~~Code~~ Act (ch. 3, sec. 487, Ill. Rev. Stat. 1945) provides that "Upon an appeal to the circuit court the cause shall be tried de novo. * * *" In the recent case of Bley v. Luebeck, 377 Ill. 50, in construing this section of the statute, the court said that "A trial de novo in an appellate tribunal is a trial had as if no action whatever had been instituted in the court below; a trial anew in the appellate tribunal according to the usual or prescribed mode of procedure in other cases involving similar questions whether of law or fact. (8 Words and Phrases, p. 7108.) The trial de novo, however, must in all cases be limited to the issues tried in the court from which the appeal is taken. Such a trial cannot extend to other issues not before or passed upon by the court in which the original trial was had." A similar construction of the statute will be found in the early case of Morgan, Admr. v. Morgan, 83 Ill. 196, as well as in Schultz v. Chicago City

"MR. STEERS [Petitioner's counsel]: I can see where you

arrive at a situation that would be highly detrimental to the one who did the appealing. Suppose in trying this de novo he should ask for and prove that he was entitled to the property? "THE COURT: Let's analyze this. Suppose there is a piano, phonograph and automobile, and the Probate Court holds the automobile belongs to her; the phonograph and the piano belong to the other person. He appeals from the automobile. You do not appeal from the other two. That is an adjudication. There is nothing de novo about it. Those items are disposed of. I only review that which is before me on the appeal.

"MR. STEERS: I disagree with your Honor on that. I am

going to look it up.

"THE COURT: If the Probate Court held on the property

and then the Probate Court adjudicated it in her favor, there is only one thing to do, perfect your appeal. You did not."

Section 333 of the Probate ~~XXXX~~ Act (Ch. 3, sec. 487,

Ill. Rev. Stat. 1945) provides that "Upon an appeal to the

circuit court the cause shall be tried de novo. " * * " In the recent case of Blay v. Linsbeck, 377 Ill. 70, in construing this section of the statute, the court said that "A trial de novo in

an appellate tribunal is a trial had as if no action whatever

had been instituted in the court below; a trial new in the appellate tribunal according to the usual or prescribed mode of procedure in other cases involving similar questions whether of law or fact. (8 Words and Phrases, p. 7208.) The trial de novo, however, must in all cases be limited to the issues tried in the

court from which the appeal is taken. Such a trial cannot

extend to other issues not before or passed upon by the court

in which the original trial was had." A similar construction

of the statute will be found in the early case of Moran, Adm.

v. Moran, 83 Ill. 196, as well as in Schultz v. Chicago City

Bank and Trust Co., 384 Ill. 148. There are instances, of course, where each item in the administrator's account constitutes a separate claim, depending alone upon its own merits and having no connection with other claims, and as was pointed out in Morgan, Admr. v. Morgan, 83 Ill. 196, "The judgment upon it must, then, necessarily, be a separate judgment, from which an appeal may be taken." In that situation it was held in Curts v. Brooks, 71 Ill. 125, that upon an appeal from the County Court as to certain items of the final account, the Circuit Court acquired jurisdiction only over that part of the judgment affecting the items appealed from, and could hear evidence and adjudicate only upon the rejected items of the report. It cannot try any question that may arise as to any other item of the account for the reason that no appeal having been taken from such other items, the County Court had the power, and it was its duty, to proceed to make a distribution of all the funds in the hands of the administrator, except a sum equal to the amount of the items involved in the appeal. In the case at bar, however, the petitioner, as administratrix of the estate of Michael P. Breen, deceased, found that she was unable to file an inventory because all of the household goods and chattels and the Buick automobile had been seized by respondent, and no inventory could be prepared and filed until the Probate Court had heard and passed upon the respective claims of the petitioner and respondent as to the ownership of the chattels in the decedent's home at the time of his death. In a trial de novo petitioner was entitled to be heard upon all issues passed upon by the Probate Court and to introduce any competent evidence upon any issue which was properly before the Probate Court on the original hearing. This right was denied her, the Circuit

Bank and Trust Co., 384 Ill. 126. There are instances, of course, that each item in the administrator's account constitutes a separate claim, depending alone upon its own merits and having no connection with other claims, and as was pointed out in Morgan, Admin. v. Morgan, 83 Ill. 196, "The judgment upon it must, then, necessarily, be a separate judgment, from which an appeal may be taken." In that situation it was held in Guth v. Brooks, 71 Ill. 125, that upon an appeal from the County Court as to certain items of the final account, the Circuit Court acquired jurisdiction only over that part of the judgment affecting the items appealed from, and could hear evidence and adjudge only upon the rejected items of the report. It cannot try any question that may arise as to any other item of the account for the reason that no appeal having been taken from such other items, the County Court had the power, and it was its duty, to proceed to make a distribution of all the funds in the hands of the administrator, except a sum equal to the amount of the items involved in the appeal. In the case at bar, however, the petitioner, as administratrix of the estate of Michael J. Green, deceased, found that she was unable to file an inventory because all of the household goods and chattels and the Buick automobile had been seized by respondent, and no inventory could be prepared and filed until the Probate Court had heard and passed upon the respective claims of the petitioner and respondent as to the ownership of the chattels in the decedent's home at the time of his death. In a trial de novo petitioner was entitled to be heard upon all issues passed upon by the Probate Court and to introduce any competent evidence upon any issue which was properly before the Probate Court on the original hearing. This right was denied her, the Circuit

Court having refused to consider such evidence, and in that respect we think the ruling constituted reversible error.

As a second ground for reversal it is urged that when the petitioner examined respondent under section 60 of the Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110) for the purpose of identifying signatures on documents and of showing that deceased was the head of the family and as such had possession of the chattels in the Oak Park home and the summer home in Lake Geneva, Wisconsin, at the time of his death, the court ruled that such limited examination removed the prohibition of section 2 of the Evidence Act (Ill. Rev. Stat. 1945, ch. 51), and accordingly permitted respondent to testify in her own behalf fully and completely as to all matters in issue. After a careful examination of the record we have concluded that petitioner's objection is meritorious. Petitioner called respondent and asked her to identify her signature on several documents which she had filed in the Probate Court, showing that she had possession of the goods and chattels; and several of the documents also had some bearing upon the ownership of the automobile which was purchased in the name of her father and for which state licenses had been issued to him up to the time of his death. It would, of course, have been competent for the court to have permitted respondent's counsel to cross-examine her on any of the matters covered by her examination under section 60 of the Civil Practice Act, but her testimony went far beyond this scope; it covered conversations and transactions not touched upon in her examination by the petitioner under section 60 and she was permitted, apparently without limitation, to testify in her own behalf as fully and completely as if there had been no statutory prohibition.

Under the current weight of authority in this state

Under the current weight of authority in this state

completely as if there had been no statutory prohibition.

out limitation, to testify in her own behalf as fully and

tioner under section 60 and she was permitted, apparently with-

transactions not touched upon in her examination by the peti-

went far beyond this scope; it covered conversations and

under section 60 of the Civil Practice Act, but her testimony

examine her on any of the matters covered by her examination

for the court to have permitted respondent's counsel to cross-

time of his death. It would, of course, have been competent

and for which state license had been issued to him up to the

the automobile which was purchased in the name of her father

of the documents also had some bearing upon the ownership of

that she had possession of the goods and chattels; and several

documents which she had filed in the Probate Court, showing

respondent and asked her to identify her signature on several

petitioner's objection is meritorious. Petitioner called

a careful examination of the record we have concluded that

behalf fully and completely as to all matters in issue. After

and accordingly permitted respondent to testify in her own

section 2 of the Evidence Act (Ill. Rev. Stat. 1945, ch. 51),

ruled that such limited examination removed the prohibition of

Lake Geneva, Wisconsin, at the time of his death, the court

of the chattels in the Oak Park home and the summer home in

deceased was the head of the family and as such had possession

pose of identifying signatures on documents and of showing that

Civil Practice Act (Ill. Rev. Stat. 1945, ch. 110) for the pur-

the petitioner examined respondent under section 60 of the

As a second ground for reversal it is urged that when

respect we think the ruling constituted reversible error.

Court having refused to consider such evidence, and in that

the court should have confined the scope and subject matter of the respondent's testimony to the matters upon which she was interrogated by the petitioner. She did not become a competent witness for all purposes and upon all issues of the case. In In re Estate of Wright, 304 Ill. App. 87, it was held that in a controversy as to ownership of certain securities as between executors of the estate of decedent and a person claiming them by alleged gift inter vivos, even though the executors called claimant under section 60 of the Civil Practice Act as a witness to prove the handwriting of the deceased, nevertheless that fact did not remove her incompetency as a witness so that she could testify in her own behalf concerning the subject matter of the letter. To the same effect see Loeb et al. v. Stern, 198 Ill. 371, Blum, Admx., v. Getz, 294 Ill. App. 432, and Garrus et al., v. Davis, 234 Ill. 326. See also the recent case of De Young v. Ralley, 329 Ill. App. 1, and cases cited therein.

As the matter was tried, much of the evidence submitted by the respondent in an attempt to support her claim to the property in question was incompetent, improper and irrelevant, and without it she has not established her right to the chattels which the court awarded her. As counsel for petitioner suggests, if such testimony were permissible, the property of no decedent would be safe from seizure. On the other hand, the court on the trial de novo should have received evidence offered by the petitioner regarding all property which the Probate Court found by its order to belong to the respondent.

For the reasons stated, the judgment of the Circuit Court is reversed and the cause remanded for a new trial.

ORDER REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Scanlan, J., concur.

the court should have confined the scope and subject matter of the respondent's testimony to the matters upon which she was interrogated by the petitioner. She did not become a competent witness for all purposes and upon all issues of the case. In In re Estate of Wright, 304 Ill. App. 87, it was held that in a controversy as to ownership of certain securities as between executors of the estate of decedent and a person claiming them by alleged gift inter vivos, even though the executors called claimant under section 60 of the Civil Practice Act as a witness to prove the handwriting of the decedent, nevertheless that fact did not remove her incompetency as a witness so that she could testify in her own behalf concerning the subject matter of the letter. To the same effect see Loop et al. v. Stern, 198 Ill. 371, Blum v. Gelfe, 294 Ill. App. 432, and Garnes et al. v. Davis, 234 Ill. 326. See also the recent case of De Young v. Bailey, 329 Ill. App. 1, and cases cited therein.

As the matter was tried, much of the evidence submitted by the respondent in an attempt to support her claim to the property in question was incompetent, improper and irrelevant, and without it she has not established her right to the chattels which the court awarded her. As counsel for petitioner suggests, if such testimony were permissible, the property of no decedent would be safe from seizure. On the other hand, the court on the trial de novo should have received evidence offered by the petitioner regarding all property which the Probate Court found by its order to belong to the respondent. For the reasons stated, the judgment of the Circuit Court is reversed and the cause remanded for a new trial.

ORDINER REVERSED AND CAUSE
REMANDED FOR A NEW TRIAL.

Sullivan, P. J., and Seaborn, J., concur.

43542

PASQUALE RAIMONDI,
Appellee,

v.

ZIFFRIN TRUCK LINES, a
corporation, and DAVE CAVE,
Defendants.

ZIFFRIN TRUCK LINES, a
corporation,
Appellant.

49
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

329 I.A. 650

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Pasquale Raimondi, plaintiff, sued Ziffrin Truck Lines, and Dave Cave, its truck driver and servant, to recover for personal injuries sustained by plaintiff in an accident. Plaintiff dismissed the suit as to defendant Cave. A jury returned a verdict finding defendant Ziffrin Truck Lines guilty and assessing plaintiff's damages at \$35,000. Defendant appeals from a judgment entered upon the verdict.

The accident occurred on Cermak road near Sangamon street, in Chicago, about 5 o'clock P.M. September 22, 1943. It was a dry, clear day. An industrial district surrounds the place. The motor vehicle that injured plaintiff was a truck and trailer, also referred to as a tractor and trailer. Cermak road is fifty-five feet wide from curb to curb. It has two street car tracks in its center portion. Between the south rail of the east bound tracks and the south curb line of Cermak road is a space twenty feet, two inches wide, which is concreted. The space in the car tracks and between the tracks is paved with granite blocks. Sangamon street, an unpaved road, runs south only to Cermak road. There are sidewalks on the north and south sides of Cermak road but none on Sangamon street. There were signs along Cermak road west of Sangamon street which indicated that the speed of vehicles was limited to twenty-five miles per

PASADALE RAILROAD,
Appellee,

v.

ELIOT TRUCK LINES, a
corporation, and DAVE CAVE,
Defendants.ELIOT TRUCK LINES, a
corporation,
Appellant.APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

3221 A. 650

MR. JUSTICE SCAMMAN DELIVERED THE OPINION OF THE COURT.

Pasadale Railroad, plaintiff, and Eliot Truck Lines, and Dave Cave, its truck driver and servant, to recover for personal injuries sustained by plaintiff in an accident. Plaintiff dismissed the suit as to defendant Cave. A jury returned a verdict finding defendant Eliot Truck Lines guilty and assessing plaintiff's damages at \$37,000. Defendant appeals from a judgment entered upon the verdict.

The accident occurred on German road near Gangamon street, in Chicago, about 7 o'clock P.M. September 22, 1943. It was a dry, clear day. An industrial district surrounds the place. The motor vehicle that injured plaintiff was a truck and trailer, also referred to as a tractor and trailer. German road is fifty-five feet wide from curb to curb. It has two street car tracks in its center portion. Between the south rail of the east bound tracks and the south curb line of German road is a space twenty feet, two inches wide, which is concreted. The space in the car tracks and between the tracks is paved with granite blocks. Gangamon street, an unpaved road, runs south only to German road. There are sidewalks on the north and south sides of German road but none on Gangamon street. There were signs along German road west of Gangamon street which indicated that the speed of vehicles was limited to twenty-five miles per

hour. Four sets of railroad tracks cross Cermak road in the vicinity of Sangamon street. From Racine avenue to Halsted street no north and south streets cross Cermak road. There is no crosswalk nor designated place for pedestrians to cross Cermak road at the point where Sangamon street would intersect Cermak road if it were extended, but there was a regular stopping place for east bound street cars, which was located just west of where Sangamon street would cross Cermak road if it were extended. To the north of Cermak road is vacant land. The driver of defendant's truck was familiar with the situation at that point. About one hundred fifty to one hundred seventy-five feet north of Cermak road there is a building of Chicago Macaroni Company, where plaintiff was employed. It faces south. About 5 P.M. on the day of the accident plaintiff left his employer's place of business and proceeded south across a prairie toward Cermak road, intending to get an east bound street car upon that street. When he reached the north side of Cermak road he saw an east bound street car when it was within forty or fifty feet west of him, and he then saw it stop at the regular stopping place. Plaintiff's theory of fact is that before he started to cross Cermak road there was no west bound traffic, and that when he left the north side of Cermak road the street car had stopped and "there was a bunch of people to pick up"; that before he left the curb he looked to the west and saw defendant's truck traveling on the concreted part of Cermak road south of the street car track; that the truck was then about one and one-half blocks to the west of Sangamon street; that when plaintiff was on the north side of the street car line he looked again and saw the truck about a block away and it was still traveling south of the east bound street car track; that when he was in the back of the street car, on the south side of the rail, he looked west and saw the truck

hour. Four sets of railroad tracks cross Germak road in the vicinity of Sangamon street. From Machine Avenue to Halsted street no north and south streets cross Germak road. There is no crosswalk nor designated place for pedestrians to cross Germak road at the point where Sangamon street would intersect Germak road if it were extended, but there was a regular stopping place for east bound street cars, which was located just west of where Sangamon street would cross Germak road if it were extended. To the north of Germak road is vacant land. The driver of defendant's truck was familiar with the situation at that point. About one hundred fifty to one hundred seventy-five feet north of Germak road there is a building of Chicago Lumber Company, where plaintiff was employed. It faces south. About 2 P.M. on the day of the accident plaintiff left his employer's place of business and proceeded south across a prairie toward Germak road, intending to get an east bound street car upon that street. When he reached the north side of Germak road he saw an east bound street car when it was within forty or fifty feet west of him, and he then saw it stop at the regular stopping place. Plaintiff's theory of fact is that before he started to cross Germak road there was no west bound traffic, and that when he left the north side of Germak road the street car had stopped and "there was a bunch of people to pick up"; that before he left the curb he looked to the west and saw defendant's truck traveling on the cornered part of Germak road south of the street car track; that the truck was then about one and one-half blocks to the west of Sangamon street; that when plaintiff was on the north side of the street car line he looked again and saw the truck about a block away and it was still traveling south of the east bound street car track; that when he was in the back of the street car, on the south side of the rail, he looked west and saw the truck

about half a block away; that when he was about five, six or seven feet behind the east bound street car it started to move; that he took four or five steps ahead but the street car went on and left him; that the accident occurred after he had made the four or five steps and after he had been standing for a few seconds at a point two to two and one-half feet south of the south rail of the east bound tracks; that when he was standing there he was about twenty-five feet east of a telephone pole with the white band, which is about fifty feet west of where Sangamon street would be if it were extended; that from where he stood to the south curb of Cermak road there was a space of seventeen and one-half to eighteen feet for the truck to travel. Plaintiff also introduced evidence to show that the truck at the time of the impact was going about thirty-five miles per hour; that there was no horn blown at any time and that the driver of the truck made no effort to turn to the right or left as he reached the place where plaintiff was standing; that the truck, after striking plaintiff, continued for a distance of one hundred fifty to two hundred feet before it stopped, leaving skid marks in the wake of the truck.

The theory of fact of defendant is that when plaintiff reached the north side of Cermak road he "chased" the east bound street car, running in a southeasterly direction toward it; that the street car was then in motion; that he failed to board the street car; that, although he knew that defendant's truck was approaching, he then started to run toward the south curb of Cermak road and ran into the trailer; that the driver of the truck had been following the east bound street car to Sangamon street, and that when the street car stopped at that point the driver of the truck slowed down, and that when the car started up again he switched to lower gear and started up with the car; that

about half a block away; that when he was about five, six or seven feet behind the east bound street car it started to move; that he took four or five steps ahead but the street car went on and left him; that the accident occurred after he had made the four or five steps and after he had been standing for a few seconds at a point two to two and one-half feet south of the south rail of the east bound tracks; that when he was standing there he was about twenty-five feet east of a telephone pole with the white band, which is about fifty feet west of where Sangamon street would be if it were extended; that from where he stood to the south end of Germak road there was a space of seventeen and one-half to eighteen feet for the truck to travel. Plaintiff also introduced evidence to show that the truck at the time of the impact was going about thirty-five miles per hour; that there was no horn blown at any time and that the driver of the truck made no effort to turn to the right or left as he reached the place where plaintiff was standing; that the truck, after striking plaintiff, continued for a distance of one hundred fifty to two hundred feet before it stopped, leaving skid marks in the wake of the truck.

The theory of fact of defendant is that when plaintiff reached the north side of Germak road he "crossed" the east bound street car, running in a southeasterly direction toward it; that the street car was then in motion; that he failed to board the street car; that, although he knew that defendant's truck was approaching, he then started to run toward the south end of Germak road and ran into the trailer; that the driver of the truck had been following the east bound street car to Sangamon street, and that when the street car stopped at that point the driver of the truck slowed down, and that when the car started up again he switched to lower gear and started up with the car; that

when he first saw plaintiff the latter was north of the east bound car, which was in motion, and plaintiff was running in a southeasterly direction toward the street car; that plaintiff then started to turn toward the south curb and the driver then swerved the truck to the right to avoid plaintiff, but plaintiff backed into the trailer. There was evidence to sustain the theory of fact of each party.

Defendant contends that it "was entitled to a directed verdict and, after a directed verdict was erroneously denied, was entitled to a judgment non obstante veredicto," because "the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law upon any theory." Defendant does not contend that the driver of the truck was not guilty of negligence as a matter of law.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297.)" (Rose v. City of Chicago, 317 Ill. App. 1, 12. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Olympia Fields Club v. Bankers Indem.

when he first saw plaintiff the latter was north of the east bound car, which was in motion, and plaintiff was running in a south-easterly direction toward the street car; that plaintiff then started to turn toward the south curb and the driver then swerved the truck to the right to avoid plaintiff, but plaintiff backed into the trailer. There was evidence to sustain the theory of fact of each party.

Defendant contends that it "was entitled to a directed verdict and, after a directed verdict was erroneously denied, was entitled to a judgment non obstante veredicto," because "the evidence shows that the plaintiff was guilty of contributory negligence as a matter of law upon any theory." Defendant does not contend that the driver of the truck was not guilty of negligence as a matter of law.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 275 Ill. 414; McGone v. Reynolds, 208 Ill. 183; Lloyd v. Bush, 273 Ill. 483; (Hunter v. Hunt, 312 Ill. 293, 296, 297.)" (Pose v. City of Chicago, 317 Ill. App. 1, 12, 666, also, Winn v. Richardson, 264 Ill. App. 493, 497; Thompson v. Chicago Motor Coach Co., 202 Ill. App. 104, 110; Wolaver v. Christian Candy Co., 293 Ill. App. 286, 287; Olympia Field Club v. Bankers Indem.

Ins. Co., 325 Ill. App. 649, 656.)

The question of contributory negligence is one preeminently for the consideration of a jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. (Blumb v. Getz, 366 Ill. 273, 277; Moran v. Gatz, 390 Ill. 478, 486.) In Blumb v. Getz, supra, the decedent, in broad daylight, walked into a traffic lane of a State highway and stooped to recover a glove which he had dropped. While in this position he was struck by the defendant's automobile. There the defendant strenuously contended that under such a state of facts the plaintiff's intestate was guilty of contributory negligence as a matter of law, but the Supreme court refused to sustain that contention. In Moran v. Gatz, supra, the plaintiff, a pedestrian, was crossing an east and west street on a crosswalk from north to south and was struck by defendant's automobile when about four feet from the south curb. The plaintiff stopped at the north curb, looked and saw cars coming from the east and waited until they had passed, and before stepping off the curb she looked west and saw two or three cars about a block away, coming east. After taking three or four steps she glanced west and saw no cars. She continued to walk south on the crosswalk and when she reached a point about four feet from the south curb she was struck by the defendant's car and injured. The Appellate court held that the plaintiff was guilty of contributory negligence as a matter of law, but the Supreme court, after an exhaustive review of authorities from other States, reversed the ruling of the Appellate court, and stated (pp. 485, 486):

"The generally accepted rule is that while a statute such as ours gives pedestrians the right of way, it does not confer

Ins. Co., 325 Ill. App. 649, 656.

The question of contributory negligence as one presently for the consideration of a jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. (Ridgely v. Gatz, 306 Ill. 273, 277; Moran v. Gatz, 390 Ill. 475, 486.) In Ridgely v. Gatz, supra, the decedent, in broad daylight, walked into a traffic lane of a state highway and stooped to recover a glove which he had dropped. While in this position he was struck by the defendant's automobile. There the defendant strenuously contended that under such a state of facts the plaintiff's intestate was guilty of contributory negligence as a matter of law, but the supreme court refused to sustain that contention. In Moran v. Gatz, supra, the plaintiff, a pedestrian, was crossing an east and west street on a crosswalk from north to south and was struck by defendant's automobile when about four feet from the south curb. The plaintiff stopped at the north curb, looked and saw cars coming from the east and waited until they had passed, and before stepping off the curb she looked west and saw two or three cars about a block away, coming east. After taking three or four steps she glanced west and saw no cars. She continued to walk south on the crosswalk and when she reached a point about four feet from the south curb she was struck by the defendant's car and injured. The appellate court held that the plaintiff was guilty of contributory negligence as a matter of law, but the supreme court, after an exhaustive review of authorities from other states, reversed the ruling of the appellate court, and stated (pp. 485, 486):

"The generally accepted rule is that while a statute such as ours gives pedestrians the right of way, it does not confer

upon them an advantage which necessarily absolves them from guilt of contributory negligence. Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Blumb v. Getz, 366 Ill. 273.) Whether failure to look was shown and constituted, in this case, want of due care, was an issue of fact for the jury. Morrison v. Flowers, 308 Ill. 189.

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety. Long Transportation Co. v. Domurat, 93 Fed. 2d 23; Young v. Tasson, 47 Cal. App. 2d 557, 118 Pac. 2d 371; Lawler v. Gaylor, 233 Iowa, 834, 10 N. W. 531; Chevalley v. Degan, (Ohio App. 1943,) 52 N. E. 2d 544; Reir v. Hart, 202 Minn. 154, 277 N. W. 405."

In their argument, counsel for defendant have not always adhered to the rules that govern the consideration of the instant contention. Instead of making a complete and impartial statement of plaintiff's evidence that is most favorable to him, they take excerpts from it which they consider favorable to defendant's contention and draw conclusions therefrom, thereby ignoring the fundamental rule that we must consider only that evidence which is favorable to plaintiff. Counsel also argue that plaintiff's evidence shows two different versions of the occurrence, but we cannot consider contradictory evidence in passing upon the instant contention. We are satisfied that we would be usurping the functions

upon them an advantage which necessarily absolves them from guilt of contributory negligence. Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Bishop v. Gatz, 306 Ill. 273.) Whether failure to look was shown and constituted, in this case, want of due care, was an issue of fact for the jury. Morrison v. Flowers, 303 Ill. 189.

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety. Long Transportation Co. v. Donahue, 93 Fed. 2d 23; Young v. Tasson, 47 Cal. App. 2d 577, 113 Pac. 2d 371; Lawler v. Gaylor, 233 Iowa, 834, 10 N. W. 531; Quevalley v. Dezan (Ohio App. 1943), 52 N. E. 2d 544; Reit v. Hart, 202 Minn. 174, 277 N. W. 465."

In their argument, counsel for defendant have not always adhered to the rules that govern the consideration of the instant contention. Instead of making a complete and impartial statement of plaintiff's evidence that is most favorable to him, they take excerpts from it which they consider favorable to defendant's contention and draw conclusions therefrom, thereby ignoring the fundamental rule that we must consider only that evidence which is favorable to plaintiff. Counsel also argue that plaintiff's evidence shows two different versions of the occurrence, but we cannot consider contradictory evidence in passing upon the instant contention. We are satisfied that we would be usurping the function

of the jury if we were to hold that plaintiff was guilty of contributory negligence as a matter of law. Furthermore, upon the oral argument before us counsel for defendant conceded that its major point upon the evidence is that even if defendant was not entitled to a directed verdict or judgment non obstante veredicto, then it is entitled to a new trial upon the ground that the verdict is manifestly against the weight of the evidence.

In People v. Hanisch, 361 Ill. 465, 468, the court said: "Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

In Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29, the court said (pp. 35, 36):

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select

of the jury if we were to hold that plaintiff was guilty of contributory negligence as a matter of law. Furthermore, upon the oral argument before us counsel for defendant conceded that its major point upon the evidence is that even if defendant was not entitled to a directed verdict or judgment non obstante veredicto, then it is entitled to a new trial upon the ground that the verdict is manifestly against the weight of the evidence.

In People v. Henschel, 361 Ill. 467, 468, the court said:

"Whatever may be the rule in certain other jurisdictions, we firmly adhere to our often-asserted belief that it is the province of the jury, alone, to determine the weight of the evidence and the credibility of witnesses. If it were not so there would be little use for the jury system. The jury, as a fact-finding body, is of such importance that an abridgment of its functions in this regard and an appropriation of them by the judges would mean the forsaking of a valued tradition in our system of jurisprudence. The utmost caution should be exercised not only by the trial courts but by the reviewing courts to uphold the sanctity of the trial by jury."

In Forrest v. People & F. W. Ry. Co., 321 U. S. 29, the

court said (pp. 35, 36):

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select

from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572; Tiller v. Atlantic Coast Line R. Co., supra [318 U. S. 54], 68; Bailey v. Central Vermont Ry., 319 U. S. 350, 353, 354. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

Many years ago our Supreme court, in Calvert v. Carpenter, 96 Ill. 63, 67, 68, stated:

"It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing. But the main difficulty does not lie here. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However artful a corrupt

from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McCabe, 132 U. S. 524, 571, 572; Tiller v. Atlantic Coast Line R. Co., 219 U. S. 541, 542; Bailey v. Central Vermont Ry., 319 U. S. 350, 373, 374. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be removed. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury would have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

"Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. Thus to enter a judgment for respondent notwithstanding the verdict is to deprive petitioner of the right to a jury trial. No reason is apparent why we should abdicate our duty to protect and guard that right in this case."

Many years ago our Supreme Court, in Galveston v. Carpenter, 95 Ill. 63, 64, stated:

"It can scarcely be repeated too often, that the judge and jury who try a case in the court below have vastly superior advantages for the ascertainment of truth and the detection of falsehood over this court sitting as a court of review. All we can do is to follow with the eye the cold words of the witness as transcribed upon the record, knowing at the same time, from actual experience, that more or less of what the witness actually did say is always lost in the process of transcribing. But the main difficulty does not lie here. There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness from merely reading the words spoken by him, even if there were no doubt as to the identity of the words. However slight a corrupt

witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things can not be transcribed upon the record, and hence they can never be considered by this court. For this reason the rule is firmly established, that where, as in this case, there is an irreconcilable conflict in the testimony, this court will not reverse the judgment of the trial court, where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict."

In the instant case both counsel assume that the jury found that a very important witness, Officer Lyons, called by defendant to support its theory of fact as to the way in which the accident occurred, committed perjury. The jury must, therefore, have regarded with suspicion the defense of contributory negligence that was interposed. Officer Lyons was assigned to the accident prevention bureau and it was his duty to investigate accidents in which automobiles and trucks were involved. In considering the importance of his testimony it must be remembered that defendant contended that plaintiff ran from the north side of Cermak road in pursuit of a moving street car; that he failed to catch the street car and then ran between the tractor and trailer unit. Officer Lyons testified that he saw plaintiff in the emergency room of the Mother Cabrini hospital at 6:05 P.M. the day of the accident; that a nurse and doctor were busy working on plaintiff, who was lying on an emergency table; that he could not then talk with plaintiff but he returned to the hospital at 6:30 P.M., saw plaintiff in a room in the hospital, had a talk with him, and remained with him approximately twenty minutes. In the examination of the witness the following occurred: "Q.

witness may be, there is generally, under the pressure of a skillful cross-examination, something in his manner or bearing on the stand that betrays him, and thereby destroys the force of his testimony. Many of the real tests of truth by which the artful witness is exposed, in the very nature of things can not be transcribed upon the record, and hence they can never be considered by this court. For this reason the rule is firmly established, that where, as in this case, there is an irreconcilable conflict in the testimony, this court will not reverse the judgment of the trial court, where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict."

In the instant case both counsel assume that the jury found that a very important witness, Officer Lyons, called by defendant to support its theory of fact as to the way in which the accident occurred, committed perjury. The jury must, therefore, have regarded with suspicion the defense of contributory negligence that was interposed. Officer Lyons was assigned to the accident prevention bureau and it was his duty to investigate accidents in which automobiles and trucks were involved. In considering the importance of his testimony it must be remembered that defendant contended that plaintiff ran from the north side of Germantown road in pursuit of a moving street car; that he failed to catch the street car and then ran between the tractor and trailer unit. Officer Lyons testified that he saw plaintiff in the emergency room of the Mother Cabrini hospital at 6:05 P.M. the day of the accident; that a nurse and doctor were busy working on plaintiff, who was lying on an emergency table; that he could not then talk with plaintiff but he returned to the hospital at 6:30 P.M., saw plaintiff in a room in the hospital, had a talk with him, and remained with him approximately twenty minutes. In the examination of the witness the following occurred: "Q.

Now at that particular time did you ask Mr. Raimondi how the accident occurred? A. Yes, I did. Q. And what did he say to you? A. He told me that he was on his way home from work, that he was going to get a streetcar, and that he didn't remember anything of the accident, except that he was after the streetcar at the time of the accident. How, he didn't know, the accident happened, or what did happen he didn't know"; that plaintiff told him that he was after a street car at the time that he was hit. In support of plaintiff's position that this testimony was perjury, evidence was offered to prove that plaintiff, after the accident and during the time that the officer claims that he had the talk with plaintiff, was unconscious. Counsel for defendant admits that the testimony of the officer "cannot be due to faulty recollection"; that it is either deliberate perjury or truthful evidence. Plaintiff denied that he made any statement to the officer, and testified that it was "a long time after the accident that I remember anything." Antoinette Raimondi, a daughter of plaintiff, testified that she, her aunt, her mother and her sister arrived at the Mother Cabrini hospital about 6:30 P.M. the evening of the accident; that her father was then in a private room on the second floor; that they went in and looked at him; that he was unconscious; that they stayed there until about 11 o'clock P.M. and that during that time her father did not appear to recognize her; that while they were there she did not see any police officers come into the room and talk with her father. Joseph Schinker, a police officer attached to a "Ford squad car, ambulance car," testified that about 5:25 P.M. September 22, 1943, they got a radio call to make an investigation of the accident, and that when they reached the place of the accident they found a man who had been struck by a truck; that there was no ambulance there and they took a stretcher out of their car, which is an ambulance car, and placed the injured party on it

Now at that particular time did you ask Mr. Raymond how the accident occurred? A. Yes, I did. Q. And what did he say to you? A. He told me that he was on his way home from work, that he was going to get a streetcar, and that he didn't remember anything of the accident, except that he was after the streetcar at the time of the accident. Now, he didn't know, the accident happened, or what did happen he didn't know; that plaintiff told him that he was after a street car at the time that he was in support of plaintiff's position that this testimony was perjury, evidence was offered to prove that plaintiff, after the accident and during the time that the officer claims that he had the talk with plaintiff, was unconscious. Counsel for defendant admits that the testimony of the officer "cannot be due to faulty recollection"; that it is either deliberate perjury or truthful evidence. Plaintiff denied that he made any statement to the officer, and testified that it was "a long time after the accident that I remember anything." Annette Raymond, a daughter of plaintiff, testified that she, her aunt, her mother and her sister arrived at the Mother Capital Hospital about 6:30 P.M. the evening of the accident; that her father was then in a private room on the second floor; that they went in and looked at him; that he was unconscious; that they stayed there until about 11 o'clock P.M. and that during that time her father did not appear to recognize her; that while they were there she did not see any police officers come into the room and talk with her father. Joseph Bohmker, a police officer attached to a "Ford aged car, ambulance car," testified that about 5:25 P.M. September 22, 1943, they got a radio call to make an investigation of the accident, and that when they reached the place of the accident they found a man who had been struck by a truck; that there was no ambulance there and they took a stretcher out of their car, which is an ambulance car, and placed the injured party on it

and rushed him to a hospital; that the man was unconscious and there was blood coming out of his mouth and ears. Frances Esposito, a nurse at the Mother Cabrini hospital, testified that she was a special nurse on the case of plaintiff; that he required a day nurse and a night nurse; that she started to work on the case September 27; that plaintiff was then unconscious and in an oxygen tent and that his condition was so serious that it was necessary for his family to stay all night; that he had been given blood plasma and after she became a nurse in the case he was fed glucose intravenously; that for several nights plaintiff was quite irrational and "tore down the oxygen canopy"; that he continued in an unconscious condition for about two weeks and after that he was semi-conscious, "stuporous." Dr. Albert Chesrow saw plaintiff at the Mother Cabrini hospital late in the evening of September 22, 1943. He testified that plaintiff was unconscious when he first saw him; that from the first time he saw plaintiff and until approximately a month thereafter plaintiff continued in an unconscious or semiconscious condition; that at times he was able to talk and then he would go back into the semi-comatose condition, unable to answer questions coherently; that plaintiff remained in an oxygen tent for at least two weeks, possibly more; that when he first saw plaintiff the latter was bleeding from the mouth, "a frothy bloody appearance." It is unnecessary at this point to detail all of the many injuries sustained by plaintiff. The trailer weighed three tons and its load weighed about one and one-half tons. That plaintiff was very seriously injured and mangled is not disputed by any evidence offered by defendant. Plaintiff introduced evidence to show that he sustained a skull fracture in the accident. While this alleged injury was questioned by defendant, the verdict of the jury determined the question. The evidence shows that for two weeks after the accident the treatment given plaintiff was "strictly

and rushed him to a hospital; that the man was unconscious and there was blood coming out of his mouth and ears. Frances Raposo, a nurse at the Mother Gabriel hospital, testified that she was a special nurse on the case of plaintiff; that he required a day nurse and a night nurse; that she started to work on the case September 27; that plaintiff was then unconscious and in an oxygen tent and that his condition was so serious that it was necessary for his family to stay all night; that he had been given blood plasma and after she became a nurse in the case he was fed glucose intravenously; that for several nights plaintiff was quite irritable and "tore down the oxygen canopy"; that he continued in an unconscious condition for about two weeks and after that he was semi-conscious, "stuporous". Dr. Albert Chesrow saw plaintiff at the Mother Gabriel hospital late in the evening of September 22, 1943. He testified that plaintiff was unconscious when he first saw him; that from the first time he saw plaintiff and until approximately a month thereafter plaintiff continued in an unconscious or semi-conscious condition; that at times he was able to talk and then he would go back into the semi-comatose condition, unable to answer questions coherently; that plaintiff remained in an oxygen tent for at least two weeks, possibly more; that when he first saw plaintiff the latter was bleeding from the mouth, "a frothy bloody appearance." It is unnecessary at this point to detail all of the many injuries sustained by plaintiff. The trailer weighed three tons and its load weighed about one and one-half tons. That plaintiff was very seriously injured and mangled is not disputed by any evidence offered by defendant. Plaintiff introduced evidence to show that he sustained a skull fracture in the accident. While this alleged injury was questioned by defendant, the verdict of the jury determined the question. The evidence shows that for two weeks after the accident the treatment given plaintiff was "strictly

supportive, meaning to sustain life." The jury undoubtedly concluded that an honest, humane police officer would not have even attempted to obtain a statement from plaintiff at the time and place in question. As to the testimony of Officer Lyons that at the time he talked with plaintiff he did not have any difficulty in understanding him, we quote from defendant's brief: "The plaintiff, who is foreign-born, unfortunately had the greatest difficulty with the English language"; that counsel in preparing defendant's brief "made several attempts to abstract his testimony in narrative form, as required by this court's rules, but all such attempts resulted either in reducing his words to incomprehensible gibberish, very unfairly to the plaintiff, or improved his testimony, equally unfairly to the defendant, by imparting to it in narrative form a continuity and coherence which the testimony itself does not possess." Officer Lyons admitted that in a report he made concerning the accident he made no mention that plaintiff told him that he was going after a street car. Counsel for plaintiff cites other parts of the evidence of Officer Lyons to support the contention that Officer Lyons' statement was fabricated in order to give support to defendant's theory of fact as to the manner in which the accident occurred. Plaintiff's evidence showed that the truck proceeded for a considerable distance after the impact; that after the accident there was a skid mark upon the pavement that was thirty-five feet long; that the skid mark appeared fresh. Officer Lyons testified that after he talked with plaintiff at the hospital he went back to the scene of the accident and examined the pavement to determine whether there were skid marks and he found none. He further testified that in the investigation he then made he looked all over the tractor and trailer for any markings, and that "we found markings on the left

supportive, meaning to sustain life." The jury undoubtedly concluded that an honest, humane police officer would not have even attempted to obtain a statement from plaintiff at the time and place in question. As to the testimony of Officer Lyons that at the time he talked with plaintiff he did not have any difficulty in understanding him, we quote from defendant's brief: "The plaintiff, who is foreign-born, unfortunately had the greatest difficulty with the English language"; that counsel in preparing defendant's brief "made several attempts to abstract his testimony in narrative form, as required by this court's rules, but all such attempts resulted either in reducing his words to incomprehensible gibberish, very material to the plaintiff, or improved his testimony, equally unfairly to the defendant, by inserting to it in narrative form a continuity and coherence which the testimony itself does not possess." Officer Lyons admitted that in a report he made concerning the accident he made no mention that plaintiff told him that he was going after a street car. Counsel for plaintiff cites other parts of the evidence of Officer Lyons to support the contention that Officer Lyons' statement was fabricated in order to give support to defendant's theory of fact as to the manner in which the accident occurred. Plaintiff's evidence showed that the truck proceeded for a considerable distance after the impact; that after the accident there was a skid mark upon the pavement that was thirty-five feet long; that the skid mark appeared fresh. Officer Lyons testified that after he talked with plaintiff at the hospital he went back to the scene of the accident and examined the pavement to determine whether there were skid marks and he found none. He further testified that in the investigation he then made he looked all over the tractor and trailer for any markings, and that "we found markings on the left

front of the trailer"; that "I would say that those markings refer to a brush mark. I could just about define that by a moving object coming in contact, such as his clothing or any part of a person's body, with the body of the tractor involved, or the truck involved. * * * The mark, in my opinion, was a brush mark. On the body of all vehicles involved, no matter whether they are out an hour they have a film on them of dust from the atmosphere I would say, from the air, and when any object comes in contact with that, it shows a marking on there, and that is what we found, this film of dirt or dust had been brushed by the object coming in contact with it there. We examined the front of that tractor to see whether or not any dust had been brushed off the front. We did not find any." The witness further testified that he knew that the brush marks were of a very recent marking; that they were made within one day but that he could not definitely state at what hour of that day they were made. Counsel for defendant state that this evidence was introduced to show that plaintiff backed or ran into the trailer. Counsel for plaintiff strenuously contends that this testimony was fabricated by the officer and was designed to support defendant's theory that the tractor did not run into plaintiff and that he ran headlong between the tractor and trailer unit, and that the tractor did not proceed any considerable distance after the impact. Officer Lyons admitted that in the report he made at the time he made no mention of the brush marks, nor did he mention the fact that he found no skid marks upon the pavement. We are satisfied that the jury were justified in finding that the testimony of the officer was perjured. The instant contention cannot be sustained.

Was the amount of the verdict excessive? Plaintiff contends that defendant has not properly raised that question. In its brief proper defendant did not raise the question, but in the

front of the tractor"; that "I would say that those markings refer to a brush mark. I could just about define that by a moving object coming in contact, such as his clothing or any part of a person's body, with the body of the tractor involved, or the truck involved. * * * The mark, in my opinion, was a brush mark. On the body of all vehicles involved, no matter whether they are out an hour they have a film on them of dust from the atmosphere I would say, from the air, and when any object comes in contact with that, it shows a marking on there, and that is what we found, this film of dust or dirt had been brushed by the object coming in contact with it there. We explained the front of that tractor to see whether or not any dust had been brushed off the front. We did not find any." The witness further testified that he knew that the brush marks were of a very recent marking; that they were made within one day but that he could not definitely state at what hour of that day they were made. Counsel for defendant states that this evidence was introduced to show that plaintiff backed or ran into the trailer. Counsel for plaintiff strenuously contends that this testimony was fabricated by the officer and was designed to support defendant's theory that the tractor did not run into plaintiff and that he ran headlong between the tractor and trailer unit, and that the tractor did not proceed any considerable distance after the impact. Officer Lyons admitted that in the report he made at the time he made no mention of the brush marks, nor did he mention the fact that he found no skid marks upon the pavement. We are satisfied that the jury were justified in finding that the testimony of the officer was perjured. The instant contention cannot be sustained. Was the amount of the verdict excessive? Plaintiff contends that defendant has not properly raised that question. In its brief proper defendant did not raise the question, but in the

course of its long argument upon points that did not directly involve the question of damages it several times stated that the amount of the verdict is grossly excessive. Plaintiff's evidence shows that he sustained a fracture of two ribs; a fracture, in "a comminuted or shattered fashion," of the left shoulder; an oblique, comminuted, displaced fracture of the femur; there was a forty-five degree malalignment in the shaft of the femur that caused a shortening of the limb and a throwing of the foot inward toward the mid-line of the body; that the pelvis was tilted downward on the right side due to a shortening of one leg; that the right leg is so bowed that it turns in toward the body and when he stands on it it is three and three-quarters inches from the ground, which condition is permanent; that the muscles of the left arm and right leg have atrophied and wasted; that because of the fracture of his left shoulder his arm can be elevated only one-half of the normal plane; that his right leg has limited motion; that he gets dizzy spells twice a day and if he does not "hold himself" he falls. Defendant did not offer evidence to rebut plaintiff's testimony as to the foregoing injuries. Plaintiff also introduced evidence tending to show that he sustained a fracture of the skull and that his hearing has been affected. Defendant disputed these two elements of damage. Plaintiff was confined to the hospital for eighty-eight days, after which he was allowed to go home. For two months he used crutches and for some time thereafter he used a cane. He wears a special shoe that is elevated three or four inches from the ground. Plaintiff was a laboring man, whose weekly compensation averaged \$45. He has not done any work since the accident. The jury were fully justified in finding that plaintiff will never be able to do arduous manual labor again. Defendant concedes that plaintiff sustained expenses due to the accident in the aggregate amount of \$2,486.86. This

course of its long argument upon points that did not directly involve the question of damages it several times stated that the amount of the verdict is grossly excessive. Plaintiff's evidence shows that he sustained a fracture of two ribs; a fracture, in "a comminuted or shattered fashion," of the left shoulder; an oblique, comminuted, displaced fracture of the femur; there was a forty-five degree malalignment in the shaft of the femur that caused a shortening of the limb and a throwing of the foot inward toward the mid-line of the body; that the pelvis was tilted downward on the right side due to a shortening of one leg; that the right leg is so bowed that it turns in toward the body and when he stands on it it is three and three-quarters inches from the ground, which condition is permanent; that the muscles of the left arm and right leg have atrophied and wasted; that because of the fracture of his left shoulder his arm can be elevated only one-half of the normal plane; that his right leg has limited motion; that he gets dizzy spells twice a day and if he does not "hold himself" he falls. Defendant did not offer evidence to rebut plaintiff's testimony as to the foregoing injuries. Plaintiff also introduced evidence tending to show that he sustained a fracture of the skull and that his hearing has been affected. Defendant disputed these two elements of damage. Plaintiff was confined to the hospital for eighty-eight days, after which he was allowed to go home. For two months he used crutches and for some time thereafter he used a cane. He wears a special shoe that is elevated three or four inches from the ground. Plaintiff was a laboring man, whose weekly compensation averaged \$45. He has not done any work since the accident. The jury were fully justified in finding that plaintiff will never be able to do arduous manual labor again. Defendant concedes that plaintiff sustained expenses due to the accident in the aggregate amount of \$2,486.86. This

sum included physicians' bill, nurses' bill, hospital bill, splint and special shoes. Plaintiff also offered testimony to show that from the date of the accident to the date of the trial he had suffered a loss of wages in the amount of \$2,700 due to the fact that he was unable to work. In considering the question as to whether or not the amount of the verdict is excessive it is necessary to take into account the decline in the purchasing power of the dollar. See Howard v. Baltimore & O. C. Terminal R. Co., 327 Ill. App. 83, 102, 103 (appeal denied by Supreme court, 391 Ill. 629), where that subject is considered. If the claim of plaintiff that he suffered a fractured skull and that his hearing has become affected is entirely disregarded, nevertheless, the amount awarded by the jury for damages is not excessive in view of the injuries that plaintiff sustained that are not in dispute.

Defendant contends that the trial court erred in giving, at plaintiff's request, the following instruction: "The Court instructs the jury that it is the duty of drivers of trucks, while driving upon public highways, to exercise ordinary and reasonable care to avoid colliding with persons lawfully using such highways." Defendant contends that this instruction assumes that plaintiff was lawfully using the public highway; that to a jury "this [instruction] must necessarily have meant that, irrespective of whether the plaintiff was lawfully or unlawfully trying to chase a street car down the street, the defendant owed him a duty." The instruction makes no reference to plaintiff nor to his duty to use due care. It states a correct, abstract proposition of law. A person may be lawfully using the highway but not exercising ordinary care at the time that he uses it. That the use of the words "lawfully using such highways" could not have misled the jury, see Murphy v. Illinois State Trust Co.,

and included physicians' bill, nurses' bill, hospital bill, splint and special shoes. Plaintiff also offered testimony to show that from the date of the accident to the date of the trial he had suffered a loss of wages in the amount of \$2,700 due to the fact that he was unable to work. In considering the question as to whether or not the amount of the verdict is excessive it is necessary to take into account the decline in the purchasing power of the dollar. See Howard v. Baltimore & O. C. Terminal R. Co., 327 Ill. App. 83, 122, 103 (appeal denied by supreme court, 321 Ill. 623), where that subject is considered. If the claim of plaintiff that he suffered a fractured skull and that his hearing has become affected is entirely disregarded, nevertheless, the amount awarded by the jury for damages is not excessive in view of the injuries that plaintiff sustained that are not in dispute.

Defendant contends that the trial court erred in giving at plaintiff's request, the following instruction: "The Court instructs the jury that it is the duty of drivers of trucks, while driving upon public highways, to exercise ordinary and reasonable care to avoid colliding with persons lawfully using such highways." Defendant contends that this instruction assumes that plaintiff was lawfully using the public highway; that to a jury "this [instruction] must necessarily have meant that, irrespective of whether the plaintiff was lawfully or unlawfully trying to chase a street car down the street, the defendant owed him a duty." The instruction makes no reference to plaintiff nor to his duty to use due care. It states a correct, abstract proposition of law. A person may be lawfully using the highway but not exercising ordinary care at the time that he uses it. That the use of the words "lawfully using such highways" could not have misled the jury, see Wright v. Illinois State Trust Co.

375 Ill. 310, 317. Defendant cites no case that holds that the giving of an instruction like the instant one constitutes reversible error. As to the cases it cites:

In Anderson v. Cummings, 325 Ill. App. 519, 527, the instruction told the jury that "it is the duty of the operator of a street car on a public highway to exercise reasonable care and caution in the operation and control of the street car, so as not to injure any person who in the exercise of ordinary care, is crossing the street." The objection made to that instruction was that "the care and caution required of the operator of the street car was such care and caution as would prevent or avoid injury to persons crossing the street." In answering that objection the court stated: "We think this objection is not warranted by the wording of the instruction. It concludes that the person in charge of the street car must so operate it as not 'to injure any person who in the exercise of ordinary care, is crossing the street.'" The court stated, however, that the instruction "was apt to be somewhat misleading." This criticism was warranted, as the jury might assume from the language therein, that we have italicized, that the court was intimating that the plaintiff was exercising ordinary care in crossing the street. But the judgment was reversed because it was held that the verdict was against the manifest weight of the evidence. The court did not hold that the giving of the instruction constituted reversible error.

In Levy v. Chicago Rys. Co., 167 Ill. App. 527, the instruction is entirely different from the one before us. It was there held that the vital error in the instruction was that it assumed as a fact a material fact in dispute.

Defendant strongly relies upon the following statement in Buglio v. Cummings, 317 Ill. App. 73, 77: "Plaintiff's given instruction No. 4 is subject to the criticism that it assumes plaintiff was lawfully attempting to cross Ashland avenue when

375 Ill. 310, 317. Defendant cites no case that holds that the giving of an instruction like the instant one constitutes reversible error. As to the cases it cites:

In Anderson v. Cummings, 325 Ill. App. 219, 227, the

instruction told the jury that "it is the duty of the operator of a street car on a public highway to exercise reasonable care and caution in the operation and control of the street car, so as not to injure any person who in the exercise of ordinary care is crossing the street." The objection made to that instruction was that "the care and caution required of the operator of the street car was such care and caution as would prevent or avoid injury to persons crossing the street." In answering that objection the court stated: "We think this objection is not warranted by the wording of the instruction. It concludes that the person in charge of the street car must so operate it as not to injure any person who in the exercise of ordinary care, is crossing the street." The court stated, however, that the instruction "was apt to be somewhat misleading." This criticism was warranted, as the jury might assume from the language therein, that we have italicized, that the court was intimating that the plaintiff was exercising ordinary care in crossing the street. But the judgment was reversed because it was held that the verdict was against the manifest weight of the evidence. The court did not hold that the giving of the instruction constituted reversible error.

In Levy v. Chicago Ry. Co., 167 Ill. App. 227, the instruction is entirely different from the one before us. It was there held that the vital error in the instruction was that it assumed as a fact a material fact in dispute.

Defendant strongly relies upon the following statement in

Huslie v. Cummings, 317 Ill. App. 73, 77: "Plaintiff's given

instruction No. 4 is subject to the criticism that it assumes plaintiff was lawfully attempting to cross Ashland avenue when

the street car was approaching." The court, however, did not hold that the giving of the instruction constituted reversible error. The judgment was reversed (p. 76) because:

"The evidence in the present case fails entirely to show that the conduct of the motorman at and before the collision with plaintiff's auto was wilful or wanton. The evidence shows to the contrary - that he used all means available to prevent the collision. The motorman testified that plaintiff's auto appeared on the north bound track suddenly and unexpectedly and there was nothing which he might have done but failed to do to prevent the collision.

"Where wilful and wanton conduct are charged and a general verdict is returned it will be presumed to be based upon the charge of which malice is the gist. Greene v. Noonan, 372 Ill. 286, 290, followed in Rowley v. Rust, 304 Ill. App. 364. Under such circumstances the judgment must be reversed." (Italics ours.)

The opinion in Taber v. Joliet Dock Co., 320 Ill. App. 238, also cited by defendant, is not published in full. The syllabus indicates that the sole question before the court was whether there was sufficient evidence to sustain the verdict, and the court settled that question by affirming the judgment for plaintiff. We must assume, therefore, that if the defendant there contended that the giving of any instruction constituted reversible error the contention was not sustained.

The contention of defendant that the jury were misled by the instant instruction is without merit. At the request of defendant six lengthy instructions were given that dealt exclusively with the question of the duty of plaintiff to exercise due care. The law bearing upon the defense of contributory negligence was elaborately and skilfully presented in the six instructions, and there is some force in plaintiff's argument that the trial court

the street car was approaching." The court, however, did not hold that the giving of the instruction constituted reversible error. The judgment was reversed (p. 76) because:

"The evidence in the present case fails entirely to show that the conduct of the motorman at and before the collision with plaintiff's auto was willful or wanton. The evidence shows to the contrary - that he used all means available to prevent the collision. The motorman testified that plaintiff's auto appeared on the north bound track and only and unexpectedly and there was nothing which he might have done but failed to do to prevent the collision.

"Where willful and wanton conduct are charged and a general verdict is returned it will be presumed to be based upon the charge of which malice is the gist. Greene v. Noonan, 372 Ill. 296, 299, followed in Rowley v. Ryan, 304 Ill. App. 364. Under such circumstances the judgment must be reversed." (Italics ours.)

The opinion in Taber v. Lohr Book Co., 320 Ill. App. 238, also cited by defendant, is not published in full. The syllabus indicates that the sole question before the court was whether there was sufficient evidence to sustain the verdict, and the court settled that question by affirming the judgment for plaintiff. We must assume, therefore, that if the defendant contended that the giving of any instruction constituted reversible error the contention was not sustained.

The contention of defendant that the jury were misled by the instant instruction is without merit. At the request of defendant six lengthy instructions were given that dealt exclusively with the question of the duty of plaintiff to exercise due care. The law bearing upon the defense of contributory negligence was elaborately and skillfully presented in the six instructions, and there is some force in plaintiff's argument that the trial court

over-instructed the jury upon the question of the care required of plaintiff.

In support of a contention that "plaintiff's attorney made highly inflammatory and grossly prejudicial arguments to the jury," defendant calls attention to the following that occurred during the opening argument of plaintiff's counsel: "Let's go back to Grislek's testimony. You recall I stood there, and I asked him, 'When that truck was one hundred feet away it was going twenty to twenty-five miles an hour,' and he said 'Yes,' and he said, 'That man was standing off the tracks 'about two and a half feet'; 'Yes,' and 'that truck kept coming'; 'yes, it did'; 'kept coming until it struck the man'; 'yes, it did.' Mr. Costello [attorney for defendant]: That is objected to, if the Court please. The Court [addressing the jury]: Ladies and gentlemen, you heard the testimony. Now, if Counsel is within the testimony he is properly arguing the case; if he outside of it he is wasting his time, because that isn't evidence at this time. All right." Defendant made no objection to the court's ruling. It argues that "This was a seriously damaging misquotation of the evidence. The truth is that when counsel for plaintiff on cross-examination (counsel was referring to the truck) asked the witness Grislek 'And it kept coming down the street about the same speed, didn't it?' the witness answered, 'No, he slowed down.'" Defendant argues that jurors do not remember the testimony, and that counsel's misstatement of the evidence aroused the feelings of the jury against defendant. It is difficult to believe that the instant contention is seriously made. The statement of plaintiff's counsel was made during his opening argument to the jury, and the objection made to it was a general one. Defendant's counsel had full opportunity to answer the statement in his argument to the jury. The following is the sole answer he made: "Counsel said this, that Grezlik, who

over-instructed the jury upon the question of the care required of plaintiff.

In support of a contention that "plaintiff's attorney made highly inflammatory and grossly prejudicial arguments to the jury," defendant calls attention to the following that occurred during the opening argument of plaintiff's counsel: "Let's go back to Grisham's testimony. You recall I stood there, and I asked him, 'When that truck was one hundred feet away it was going twenty to twenty-five miles an hour,' and he said 'Yes,' and he said, 'That man was standing off the truck about two and a half feet,' and 'that truck kept coming,' 'yes, it did,' 'kept coming until it struck the man,' 'yes, it did,' Mr. Costello [attorney for defendant]: That is objected to, if the Court please. The Court [addressing the jury]: Ladies and gentlemen, you heard the testimony. Now, if counsel is within the testimony he is properly arguing the case; if he outside of it he is wasting his time, because that isn't evidence at this time. All right." Defendant made no objection to the court's ruling. It argues that "this was a seriously damaging misstatement of the evidence. The truth is that when counsel for plaintiff on cross-examination (counsel was referring to the truck) asked the witness Grisham 'and it kept coming down the street about the same speed, didn't it,' the witness answered, 'No, he slowed down.'" Defendant argues that jurors do not remember the testimony, and that counsel's misstatement of the evidence aroused the feelings of the jury against defendant. It is difficult to believe that the instant contention is seriously made. The statement of plaintiff's counsel was made during his opening argument to the jury, and the objection made to it was a general one. Defendant's counsel had full opportunity to answer the statement in his argument to the jury. The following is the sole answer he made: "Counsel said this, that Grisham, who

was the conductor, said that the truck was going twenty or twenty-five miles an hour, but you will remember Mr. Grezlik also said that the speed of that truck was reduced just before this accident happened." The jury, therefore, had before them the version of each counsel as to what Grislek had stated and the ruling of the trial court upon the objection was a proper one. The present contention is a frivolous one.

We will now briefly refer to several technical points raised by defendant: It contends that "the plaintiff's complaint committed him to a theory which is fundamentally and utterly inconsistent with the evidence." Defendant argues that the complaint avers several times that plaintiff had no notice of defendant's approaching truck; that as plaintiff admitted in his testimony that he saw the truck approaching, therefore, in substantive law the case made out by plaintiff "is inconsistent with and repugnant to the gravamen of his present complaint." While defendant does not say so, we infer that it means to contend that plaintiff's case therefore falls. There is no merit in the contention. It is not necessary in actions ex delicto to prove all of the allegations of the complaint. If the plaintiff makes out a cause of action by proving material allegations sufficient to make out a prima facie case against the defendant, he is entitled to recover even though there be other averments of the complaint which are not proved. (See Reivitz v. Chicago Rapid Transit Co., 327 Ill. 207, 209; Weber Wagon Co. v. Kehl, 139 Ill. 644, 658; Devine v. Delano, 272 Ill. 166; Wood v. Illinois Cent. R. Co., 185 Ill. App. 180, 184; Flis v. City of Chicago, 247 Ill. App. 128; Kovell v. North Roseland Motor Sales, 275 Ill. App. 566, 581; Arado v. Epstein, 323 Ill. App. 194, 201, 202.) During the trial defendant made no point that there was a variance between the allegations of the complaint and the proof, and after verdict and judgment defendant cannot be heard

was the conductor, said that the truck was going twenty or twenty-five miles an hour, but you will remember Mr. Grellek also said that the speed of that truck was reduced just before this accident happened. The jury, therefore, had before them the version of each counsel as to what Grellek had stated and the ruling of the trial court upon the objection was a proper one. The present contention is a frivolous one.

We will now briefly refer to several technical points raised by defendant. It contends that "the plaintiff's complaint committed him to a theory which is fundamentally and utterly inconsistent with the evidence." Defendant argues that the complaint avers several times that plaintiff had no notice of defendant's approaching truck; that as plaintiff admitted in his testimony that he saw the truck approaching, therefore, in substance law the case made out by plaintiff "is inconsistent with and repugnant to the gravamen of his present complaint." While defendant does not say so, we infer that it means to contend that plaintiff's case therefore fails. There is no merit in the contention. It is not necessary in actions ex delicto to prove all of the allegations of the complaint. If the plaintiff makes out a cause of action by proving material allegations sufficient to make out a prima facie case against the defendant, he is entitled to recover even though there be other averments of the complaint which are not proved. (See Relvitz v. Chicago Rapid Transit Co., 327 Ill. 207, 209; Waber v. Wagon Co. v. Relvitz, 139 Ill. 644, 678; Devine v. Delano, 272 Ill. 186; Wood v. Illinois Cattle Co., 185 Ill. App. 180, 184; Ellis v. City of Chicago, 247 Ill. App. 128; Kovell v. North Highland Motor Sales, 275 Ill. App. 566, 581; Atago v. Tinsdale, 323 Ill. 44, 194.) During the trial defendant made no point that there was a variance between the allegations of the complaint and the proof, and after verdict and judgment defendant cannot be heard

for the first time to raise any question of variance.

We find no merit in the contention of defendant that there was "prejudicial error with respect to medical testimony and evidence of the extent of the plaintiff's injuries."

Defendant's able and astute counsel have searched the record in an effort to find some error that might cause a reversal of the judgment. We are satisfied that defendant had a fair and impartial trial and that the judgment in the instant case should be affirmed, and it is accordingly so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

for the first time to raise any question of variance.
We find no merit in the contention of defendant that
there was "prejudicial error with respect to medical testimony
and evidence of the extent of the plaintiff's injuries."
Defendant's able and astute counsel have searched the
record in an effort to find some error that might cause a
reversal of the judgment. We are satisfied that defendant
had a fair and impartial trial and that the judgment in the
instant case should be affirmed, and it is accordingly so
ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Fries, J., concur.

43736

MICHAEL KELLY,
Appellee,

v.

THOMAS J. FRIEL and CHARLES
C. RENSHAW, as Trustees, etc.,
et al., doing business as
CHICAGO SURFACE LINES,
Appellants.

51 A
)
) APPEAL FROM CIRCUIT
)
) COURT OF COOK COUNTY.

329 I.A. 651

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A suit to recover damages for personal injuries sustained by plaintiff. A jury returned a verdict for plaintiff, assessed his damages at \$1,507.78 and defendants appeal from a judgment entered upon the verdict.

This case was well tried. The many errors generally assigned in personal injury cases are not urged here. The sole contention raised by defendants is that the trial court erred in overruling their motion for judgment notwithstanding the verdict. The point raised in support of this contention is that plaintiff's evidence shows that he was guilty of contributory negligence as a matter of law.

A motion for judgment notwithstanding the verdict is in the nature of a demurrer to the evidence, and the rule is " * * * that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken^{most} strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune

MR. JUSTICE SEAN BRYAN, IN THE OPINION OF THE COURT.

Appellants.

CHICAGO BUTTRESS LUMBER CO.,
et al., doing business as
C. BRYAN, as trustees, etc.,
THOMAS J. BRYAN and CHARLES

v.

MICHAEL KELLY,
Appellee.

COURT OF COOK COUNTY.

APPEAL FROM CIRCUIT

v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489.' (Hunter v. Troup, 315 Ill. 293, 296, 297.)" (Rose v. City of Chicago, 317 Ill. App. 1, 12. See, also, Mahan v. Richardson, 284 Ill. App. 493, 495; Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597; Olympia Fields Club v. Bankers Indem. Ins. Co., 325 Ill. App. 649, 656.)

Plaintiff was about twenty-seven or twenty-eight years of age at the time of the accident, which occurred about six o'clock P.M. March 6, 1943. Plaintiff had alighted from the front platform of an east bound 63d street car at the southwest corner of 63d street and Wolcott avenue. He was intending to cross 63d street from the south side to the north side on the west crosswalk of Wolcott avenue in order to go to his home at 6030 South Wolcott avenue, which was on the west side of Wolcott avenue and about two and one half blocks north of 63d street. It was still daylight and the visibility was good. It had been snowing but it had stopped a short time before the accident. There were about two or three inches of snow on the ground and "in spots there was ice." The weather was rather cold. West bound street cars took on and discharged passengers at the northeast corner of the intersection. There was a customary white sign on a pole to indicate that it was the place where cars stopped. There were, apparently, no stop lights at the intersection. Plaintiff was familiar with the locus. Before starting to cross 63d street he stood in the west crosswalk of Wolcott avenue about three or four feet south of the east bound street car rails and waited for the east bound street car to pass. After this car had proceeded east plaintiff, before he started to cross, looked to the east and west. When he looked to the east he saw a west bound street car about sixty-five or seventy feet east of the crosswalk, which would be about one

Q23 III, pp. 104, 110; Kolozer v. Christie Candy Co. Q23 III 392

Plaintiff was about twenty-seven or twenty-eight years of age at the time of the accident, which occurred about six o'clock P.M. March 6, 1943. Plaintiff had alighted from the front platform of an east bound 63d street car at the southwest corner of 63d street and Wolcott avenue. He was intending to cross 63d street from the south side to the north side on the west crosswalk of Wolcott avenue in order to go to his home at 6030 North Wolcott avenue, which was on the west side of Wolcott avenue and about two and one half blocks north of 63d street. It was still daylight and the visibility was good. It had been snowing but it had stopped a short time before the accident. There were about two or three inches of snow on the ground and "in spots there was ice." The weather was rather cold. East bound street cars took on and discharged passengers at the northeast corner of the intersection. There was a customary white sign on a pole to indicate that it was the place where cars stopped. There were, apparently, no stop lights at the intersection. Plaintiff was familiar with the facts. Before starting to cross 63d street he stood in the west crosswalk of Wolcott avenue about three or four feet south of the east bound street car rails and waited for the east bound street car to pass. After this car had proceeded east Plaintiff, before he started to cross, looked to the east and west. When he looked to the east he saw a west bound street car about sixty-five or seventy feet east of the crosswalk, which would be about one

hundred and twenty-five feet east of where he stood. This car was slowing down as it approached the northeast corner. Plaintiff then looked to the west and saw an automobile east bound on 63d street and a little more than half a block away from where he stood. He then started to walk across 63d street from south to north in the west crosswalk "at a natural walking pace." As he was stepping over the north rail of the east bound tracks he looked again to the east and saw that the west bound street car was still approaching the east crosswalk and was about five feet east of it, which would be about sixty-five to seventy-five feet of where he was. The street car was then coming "almost to a dead stop." Plaintiff then continued walking north and when he was over the south rail of the west bound tracks he saw the west bound street car coming fast, at about a speed of fifteen to twenty miles per hour. This car was then five feet east of him. He backed up a few steps but was not able to "quite clear the front of the car," and the left front of it struck him on his right temple. He was still in the west crosswalk when he was hit. He was knocked about ten feet in a westerly direction and his body came to rest between the east bound and west bound sets of street car tracks. The street car went approximately sixty-five feet after striking plaintiff before coming to a complete stop. The evidence for plaintiff tends to show that after the west bound street car had almost come to a dead stop as it approached the usual stopping place, it then, without sounding any warning, proceeded across the intersection at a greatly accelerated rate of speed. The motorman testified that he went right across the intersection and across the west crosswalk at about fifteen or eighteen miles an hour.

We are satisfied that the sole contention of defendants cannot be sustained. The question of contributory negligence is one preeminently for the consideration of a jury, as such

hundred and twenty-five feet east of where he stood. This car was slowing down as it approached the northeast corner. Plaintiff then looked to the east and saw an automobile east bound on 63d street and a little more than half a block away from where he stood. He then started to walk across 63d street from south to north in the west crosswalk "at a natural walking pace." As he was stepping over the north rail of the east bound tracks he looked again to the east and saw that the east bound street car was still approaching the east crosswalk and was about five feet east of it, which would be about sixty-five to seventy-five feet of where he was. The street car was then coming "almost to a dead stop." Plaintiff then continued walking north and when he was over the south rail of the west bound tracks he saw the west bound street car coming east, at about a speed of fifteen to twenty miles per hour. This car was then five feet east of him. He backed up a few steps but was not able to "quite clear the front of the car," and the left front of it struck him on his right temple. He was still in the west crosswalk when he was hit. He was knocked about ten feet in a westerly direction and his body came to rest between the east bound and west bound sets of street car tracks. The street car went approximately sixty-five feet after striking plaintiff before coming to a complete stop. The evidence for plaintiff tends to show that after the west bound street car had almost come to a dead stop as it approached the usual stopping place, it then, without sounding any warning, proceeded across the intersection at a greatly accelerated rate of speed. The motorist testified that he went right across the intersection and across the west crosswalk at about fifteen or eighteen miles an hour.

We are satisfied that the sole contention of defendants cannot be sustained. The question of contributory negligence is one presently for the consideration of a jury, as such

negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. (Blumb v. Getz, 366 Ill. 273, 277; Moran v. Gatz, 390 Ill. 478, 486.) "Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith. Chicago and Eastern Illinois Railroad Co. v. Crose, 214 Ill. 602; Morrison v. Flowers, 308 id. 189." (Thomas v. Buchanan, 357 Ill. 270, 277.) In Blumb v. Getz, supra, the decedent, in broad daylight, walked into a traffic lane of a State highway and stooped to recover a glove which he had dropped. While in this position he was struck by the defendant's automobile. There the defendant strenuously contended that under such a state of facts the plaintiff's intestate was guilty of contributory negligence as a matter of law, but the Supreme court refused to sustain that contention. In Moran v. Gatz, supra, the plaintiff, a pedestrian, was crossing an east and west street on a crosswalk from north to south and was struck by defendant's automobile when about four feet from the south curb. The plaintiff stopped at the north curb, looked and saw cars coming from the east and waited until they had passed, and before stepping off the curb she looked west and saw two or three cars about a block away, coming east. After taking three or four steps she glanced west and saw no cars. She continued to walk south on the crosswalk and when she reached a point about four feet from the south curb she was struck by the defendant's car and injured. The Appellate court held that the plaintiff was guilty of contributory negligence as a matter of law, but the Supreme court, after an exhaustive review of

negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent, it is not within the province of the court to substitute its judgment for that of the jury. (Elm v. Galt, 366 Ill. 273, 277; Moran v. Galt, 390 Ill. 478, 486.) "Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith. Chicago and Eastern Illinois Railroad Co. v. Gross, 214 Ill. 602; Mortenson v. Flowers, 308 Ill. 189." (Thomas v. Mortenson, 357 Ill. 270, 277.) In Elm v. Galt, supra, the decedent, in broad daylight, walked into a traffic lane of a State highway and stooped to recover a glove which he had dropped. While in this position he was struck by the defendant's automobile. There the defendant strenuously contended that under such a state of facts the plaintiff's intestate was guilty of contributory negligence as a matter of law, but the Supreme Court refused to sustain that contention. In Elm v. Galt, supra, the plaintiff, a pedestrian, was crossing an east and west street on a crosswalk from north to south and was struck by defendant's automobile when about four feet from the south curb. The plaintiff stopped at the north curb, looked and saw cars coming from the east and waited until they had passed, and before stepping off the curb she looked west and saw two or three cars about a block away, coming east. After taking three or four steps she glanced west and saw no cars. She continued to walk south on the crosswalk and when she reached a point about four feet from the south curb she was struck by the defendant's car and injured. The Appellate Court held that the plaintiff was guilty of contributory negligence as a matter of law, but the Supreme Court, after an exhaustive review of

authorities from other States, reversed that ruling of the Appellate court, and stated (pp. 485, 486):

"The generally accepted rule is that while a statute such as ours gives pedestrians the right of way, it does not confer upon them an advantage which necessarily absolves them from guilt of contributory negligence. Each case must be determined from its particular facts. The question of contributory negligence is one which is pre-eminently for the consideration of a jury. It cannot be defined in exact terms and unless it can be said that the failure of the plaintiff to look again was so palpably contrary to the conduct of a reasonably prudent person as to show contributory negligence, the issue is one for the jury. (Blumb v. Getz, 366 Ill. 273.) Whether failure to look was shown and constituted, in this case, want of due care, was an issue of fact for the jury. Morrison v. Flowers, 308 Ill. 189.

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety. Long Transportation Co. v. Domurat, 93 Fed. 2d. 23; Young v. Tassop, 47 Cal. App. 2d 557, 118 Pac. 2d 371; Lawler v. Gaylor, 233 Iowa, 834, 10 N. W. 531; Chevalley v. Degan, (Ohio App. 1943,) 52 N. E. 2d 544; Reir v. Hart, 202 Minn. 154, 277 N. W. 405."

In several late cases the Supreme court has laid down the rule that whether it is negligence to cross a street car track at an intersection ahead of an approaching street car is an issue of fact for a jury. (See Gnat v. Richardson, 378 Ill. 626, 629.) The ruling in the important case of Moran v. Gatz, *supra*, is, in our judgment, decisive of the contention now before us. To

authorities from other states, reversed that ruling of the
Appellate court, and stated (pp. 485, 486):
"The generally accepted rule is that while a statute such
as ours gives pedestrians the right of way, it does not confer
upon them an advantage which necessarily absolves them from guilt
of contributory negligence. Each case must be determined from
its particular facts. The question of contributory negligence
is one which is pre-eminently for the consideration of a jury.
It cannot be defined in exact terms and unless it can be said
that the failure of the plaintiff to look ahead was so palpably
contrary to the conduct of a reasonably prudent person as to
show contributory negligence, the issue is one for the jury."
(Blump v. Getz, 306 Ill. 273.) Whether failure to look was shown
and constituted, in this case, want of due care, was an issue of
fact for the jury. (Morrison v. Flowers, 308 Ill. 139.)
"The rule seems to be quite universal that a pedestrian's
failure to keep a constant lookout, or to look on in after having
determined that he can safely cross ahead of approaching traffic,
is not contributory negligence as a matter of law but it is a
question for a jury whether he was in the exercise of ordinary
care for his own safety. (Long Transportation Co. v. Downard, 93
Fed. 2d 73; Young v. Passog, 47 Cal. App. 2d 727, 118 Pac. 2d
371; Lawler v. Gaylor, 233 Iowa, 834, 10 N. W. 521; Chavalex
v. Menard, (1940 App. 1943), 52 N. W. 2d 544; Hein v. Lamb, 202
Minn. 154, 257 N. W. 405.)"
In several late cases the Supreme Court has laid down the
rule that whether it is negligence to cross a street car track
at an intersection ahead of an approaching street car is an issue
of fact for a jury. (See Quat v. Richardson, 378 Ill. 686, 690.)
The ruling in the important case of Worsh v. Getz, supra, is, in
our judgment, decisive of the contention now before us. To

repeat the rule therein stated (p. 486):

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety." (Italics ours.)

In this connection it must be noted that the plaintiff in the instant case was crossing the street in the regular crosswalk at the time that he was struck by the street car and that just prior to the impact the street car had slowed down almost to a dead stop at the regular stopping place for the west bound cars, and a reasonable inference arises from the evidence that after the street car had so slowed down it suddenly and without warning picked up speed and crossed the intersection and the west crosswalk at a greatly accelerated rate of speed. The jury determined that plaintiff was not guilty of contributory negligence, and we approve of their finding in that regard.

In our opinion the trial court would have been guilty of a usurpation of the functions of the jury had he granted the motion of defendants for judgment notwithstanding the verdict.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

request the rule therein stated (p. 486):

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety." (Italics ours.)

In this connection it must be noted that the plaintiff

in the instant case was crossing the street in the regular crosswalk at the time that he was struck by the street car and that just prior to the impact the street car had slowed down almost to a dead stop at the regular stopping place for the west bound cars, and a reasonable inference arises from the evidence that after the street car had so slowed down it suddenly and without warning picked up speed and crossed the intersection and the west crosswalk at a greatly accelerated rate of speed. The jury determined that plaintiff was not guilty of contributory negligence, and we approve of their finding in that regard. In our opinion the trial court would have been guilty of a usurpation of the functions of the jury had he granted the motion of defendants for judgment notwithstanding the verdict. The judgment of the Circuit Court of Cook County is

affirmed.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Friend, J., concur.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

General No. 9534

Agenda No. 15

ORVAL E. LINN,

Plaintiff-Appellee,

-vs-

DOROTHY C. LINN,

Defendant-Appellant.)

Appeal from the

Circuit Court of

Macon County.

329 I.A. 652

DADY, P. J.

The only question before us is whether the Circuit Court of Macon County erred in entering a decree which transferred the custody of Olga Dell Linn, an eight year old girl, from her grandmother to her father.

There is no ^{material} conflict in the evidence.

Orval E. Linn, hereafter referred to as "plaintiff," and Dorothy C. Linn, hereafter referred to as "defendant," were married on December 11, 1933. He was then aged about 22 years and she ~~was~~ about 16 years. Defendant's parents then lived and still live in Moweaqua, Illinois.

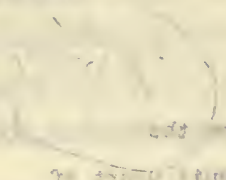
Plaintiff and defendant lived as husband and wife until about September or October 1936. During such time their home was in the home of the maternal grandparents. Two children were born of the marriage. The older child died sometime before the birth of Olga. Olga was born September 28, 1937.

Abstract

STATE OF ILLINOIS
JANUARY 1934

General 1 10 1934

January 12



Approved by the

Committee of

the Court

ORVAL E. LIND,)
Plaintiff-Appellee,)
vs-)
DOROTHY G. LIND,)
Defendant-Appellant.)

LADY, J. C.

The only question before me is whether the Circuit

Court of Cook County erred in granting a decree with respect

to the custody of Clara Bell Lind, an eight year old girl, from her

grandmother to her father.

There is no ^{disputed} question in the evidence.

Orval E. Lind, hereafter referred to as "plaintiff",

and Dorothy G. Lind, hereafter referred to as "defendant", were

married on December 11, 1928. He was then about 28 years old

and she about 18 years. Defendant's mother is Clara Bell Lind and still

live in Evanston, Illinois.

Plaintiff and defendant lived at Evanston until

about September 10, 1933. Defendant was then about 18 years old

in the home of the maternal grandparents. Two of her brothers

of the marriage. The other three had been born before the birth

of Clara. Clara was born September 10, 1928.

On March 4, 1942, plaintiff obtained in the Circuit Court of Macon County a divorce from defendant on the ground of desertion. The decree gave the custody of Olga to the maternal grandmother, Della Jacobs, until the further order of the court, with reasonable of visitation rights in plaintiff and defendant, and ordered plaintiff to pay Mrs. Jacobs \$5.00 per week for the support of Olga. At all times since the entry of such decree and pursuant thereto Mrs. Jacobs has had the custody of Olga.

After the entry of the divorce decree on March 4, 1942, no further proceedings were had in the divorce case until April 17, 1946, when defendant filed in said proceeding a petition for a rule on plaintiff to show cause why he should not be held in contempt of court for failure to pay the \$5.00 per week so ordered to be paid toward the support of Olga. On May 11, 1946, plaintiff filed his answer thereto, in which he admitted he was \$122.00 in arrears, and stated that this amount would be paid before a hearing on the petition. On the same day he filed ^a counter-claim in which he asked that he be given the custody of Olga. Defendant filed her answer thereto denying that it was for the best interest of Olga that plaintiff be given such custody. On June 3, 1946, at the beginning of the hearing on such counter-claim, the plaintiff paid such \$122.00 plus \$15.00 additional that had accrued. After a hearing on such counter-claim and answer thereto, the order now appealed from was entered.

Olga was born in the home of Mr. and Mrs. Jacobs. She is in the fourth grade and has attended school regularly. Her school grades have been reasonably good. She has gone to Sunday School practically every Sunday since she was aged about two years. No question of religious differences exists in this proceeding.

On March 4, 1942, Plaintiff obtained in the Circuit Court of Jackson County a divorce from defendant on the ground of desertion. The decree gave the custody of the children to the maternal grandmother, Belle Jacob, until the further order of the court, with reasonable rights in Plaintiff and defendant, and ordered Plaintiff to pay Mrs. Jacobs \$5.00 per week for the support of Clara. At all times since the entry of such decree and pursuant thereto Mrs. Jacobs has had the custody of Clara.

After the entry of the divorce decree on March 4, 1942, no further proceedings were had in the divorce case until April 17, 1946, when defendant filed in said proceeding a petition for a rule on Plaintiff to show cause why he should not be held in contempt of court for failure to pay the \$5.00 per week as ordered to be paid toward the support of Clara. On May 11, 1946, Plaintiff filed his answer thereto, in which he admitted he was in default, and stated that this amount would be paid before a hearing on the petition. On the same day he filed a counter-claim in which he asked that he be given the custody of Clara. Defendant filed her answer thereto denying that it was for the best interest of Clara that Plaintiff be given such custody. On June 8, 1946, at the beginning of the hearing on said counter-claim, the Plaintiff paid each \$122.00 plus \$1.00 additional Court had awarded. Thereafter on such counter-claim and answer thereto, the court gave a hearing for was ordered.

Clara was born in the home of Mr. and Mrs. Jacobs. She is in the fourth grade and has attended school regularly. Her mother has been reasonably good. The father has been practically every twenty years since she was about two years. No question of religious difference exists in this proceeding.

When younger, Olga's health was somewhat frail, but at the time of the hearing and for quite sometime prior thereto she was in good health. She was apparently happy and contented.

Mrs. Jacobs and her husband, who are the maternal grandparents, were each aged 59 years at the time of the hearing on June 3, 1946. Mrs. Jacobs devotes all of her time to her housework. Mr. Jacobs is a laborer. They are apparently in moderate but comfortable circumstances. They live in and apparently own a house and lot with four adjoining vacant lots. The home is very well kept. Other than Mr. and Mrs. Jacobs and Olga, no one lives in such home, except that defendant lives there when she is not working.

Defendant has never remarried. Her principal occupation is and has been that of a waitress. During the time when Olga was between two and four years of age, defendant, in order to help support Olga, worked as a waitress in a restaurant and tavern from 6:00 A. M. to 2:00 P. M. and from 4:00 P. M. until midnight. Since Olga was about four years old defendant has not worked in a tavern. When not working defendant has lived with her father and mother, and when working has regularly visited Olga two and three times a week and on week ends.

Plaintiff remained single from the time he was divorced on March 4, 1942, until he married his present wife in June, 1942. They have two children, one born in November, 1942, and one born in November, 1943. They live in a four room modern apartment on the second floor of an apartment ^{building} in Chicago. Fifteen families live in the same building. The public school is two blocks distant.

From about October 10, 1942, to October 10, 1945, plaintiff was in the army. As soon as discharged he resumed his occupation as a

When younger, Oja's health was somewhat frail, but at the time of the hearing for quite sometime prior thereto she was in good health. She was apparently happy and contented.

Mrs. Jacobs and her husband, who are the maternal grandparents, were born aged 20 years at the time of the hearing on June 3, 1948. Mrs. Jacobs devotes all of her time to her housework. Mr. Jacobs is a laborer. They are apparently in moderate but comfortable circumstances. They live in and apparently own a house and lot with four adjoining vacant lots. The home is very well kept. Other than Mr. and Mrs. Jacobs and Oja, no one lives in such home, except that defendant lives there when she is not working.

Defendant has never remarried. Her principal occupation is and has been that of a waitress. During the time when Oja was between two and four years of age, defendant, in order to help support Oja, worked as a waitress in a restaurant and tavern from 6:00 A. M. to 8:00 P. M. and from 1:00 P. M. until midnight. Since Oja was about four years old defendant has not worked in a tavern, then not working defendant has lived with her father and mother, and when working has regularly visited her two and three times a week and on week ends.

Plaintiff remained single from the time he was divorced on March 4, 1943, until he married his present wife in June, 1943. They have two children, one born in November, 1943, and one born in November, 1945. They live in a four room modern apartment on the second floor of an apartment building in Chicago. Fifteen families live in the same building. The public school is two blocks distant.

From about October 10, 1943, to October 10, 1945, plaintiff was in the city. As soon as discharged he resumed his occupation as a

truck driver. He makes approximately \$70.00 a week and his present route is from Chicago to Peoria and return. He leaves Chicago about 6:00 P. M. and gets back to Chicago about 6:00 A. M. and he is home five days a week. He does not drink or smoke.

Mary Linn, the present wife of plaintiff, is aged 26 years. She gives her whole attention to her home and attends church regularly. She first saw Olga in January, 1941, when she went through Moweaqua with her husband's sister. She next saw Olga in December, 1945. These are the only times she testified to having seen Olga, but she testified that she had written letters to Olga and received a few letters from Olga,- none since March, 1946. She further testified that she was willing and anxious to have Olga come into her home, and would give her the same care and attention that she gave her own children.

So far as the record shows, Mrs. Linn is a very good woman, and Mr. and Mrs. Jacobs are also very good people.

So far as the record shows, there is no evidence tending to show that the defendant, the mother of Olga, is not or has not been a good mother and an industrious moral woman of good habits.

On the present hearing the plaintiff testified that prior to being cited into court for failure to pay support money, he did not mention to the plaintiff or Mrs. Jacobs that he wanted the custody of Olga, that he "got that thought in mind" after he was brought into court, but later, on cross examination, he testified that he had talked the matter over with his present wife "quite sometime" before. He further testified that Mrs. Jacobs had always treated him all right, that she had never denied him the privilege of coming to visit with Olga, and that he was not making any contention but that Mrs. Jacobs was giving Olga good attention and care. He

truck driver. He makes approximately \$70.00 a week and his present
route is from Chicago to Texas and return. He leaves Chicago about
8:00 P. M. and gets back to Chicago about 8:00 A. M. and he is home
five days a week. He does not drink or smoke.

Mary Lynn, the present wife of Plaintiff, is aged 24 years.
She gives her whole attention to her home and attends church regularly.
She first saw Olga in January, 1941, when she went through Keweenaw
with her husband's estate. She next saw Olga in December, 1944.
These are the only times she testified to having seen Olga, but she
testified that she had written letters to Olga and received a few
letters from Olga - none since March, 1944. She further testified
that she was willing and anxious to have Olga come into her home,
and would give her the same care and attention that she gave her own
children.

So far as the record shows, Mrs. Lynn is a very good woman,
and Mr. and Mrs. Jacobs are also very good people.
So far as the record shows, there is no evidence tending to
show that the defendant, the mother of Olga, is not or has not been
a good mother and an irresponsible and bad wife.
On the present hearing the Plaintiff testified that prior to
being cited into court for failure to pay support money, he did not
mention to the Plaintiff or Mrs. Jacobs that he wanted the custody
of Olga, that he "got that thought in mind" after he was brought
into court, but later, or some examination, he testified that he
had talked the matter over with the present wife "quite sometime"
before. He further testified that Mrs. Jacobs had always treated
him all right, that she had never denied him the privilege of coming
to visit with Olga, and that he was not having any contention but
that Mrs. Jacobs was giving Olga good affection and care. He

further testified that at the time he obtained the decree he had no home or facilities for taking care of Olga.

As to the interest shown by plaintiff toward the welfare and support of Olga before he filed his petition seeking her custody, the proofs show the following: He was not present at her birth and did not see her until she was three weeks old. His explanation of this was that his employment as a truck driver prevented his attendance. Defendant testified that prior to Olga's birth she had not seen plaintiff "since the Lord knows when." This he did not deny. He next saw Olga for a few minutes when she was four or five months old, and the next time when she was about one year old. He saw her about five times before going in the army. During the three year period that he was in the army, as far as the record shows, he did not see Olga, but says he wrote her when he could do so. After getting out of the army in October, 1945, he first saw Olga about Christmas 1945, when he and his wife and children visited his father at Moweaqua, where he then saw Olga for two days. He next saw her one day in February 1946 at his father's home, and next saw her "not very long" at his father's home about the middle of April, 1946. So far as the record shows he did not see her again before his petition was filed herein. Defendant testified that plaintiff contributed nothing toward Olga's support until she was about four years old, except that he gave her two snow suits. His only testimony as to what he contributed during such period was that he paid "quite a bit." When Olga was about four years old an order was entered in the County Court on the application of defendant which required plaintiff to thereafter pay \$5.00 per week toward Olga's support.

Further testified that at the time he obtained the degree he had no home or facilities for taking care of Olga.
As to the interest shown by Plaintiff toward the welfare and support of Olga before he filed his petition seeking her custody, the proofs show the following: he was not present at her birth and did not see her until she was three weeks old. His explanation of this was that his employment as a truck driver prevented his attendance. Defendant testified that prior to Olga's birth he had not seen Plaintiff "since the last time then." This is did not deny. He next saw Olga for a few minutes when she was four or five months old, and the next time when she was about one year old. He saw her about five times before going in the army. During the three year period that he was in the army, as far as the record shows, he did not see Olga, but says he wrote her when he could do so. After getting out of the army in October, 1945, he first saw Olga about Christmas 1945, when he and his wife and children visited his father at Worcester, where he then was for two days. He next saw her one day in February 1946 at his father's home, and next saw her "not very long" at his father's home about the middle of April, 1946. As far as the record shows he did not see her again before his petition was filed herein. Defendant testified that Plaintiff contributed nothing toward Olga's support until she was about four years old, except that he gave her two snow globes. His only testimony as to what he contributed during each period was that he said "nothing a lot." When Olga was about four years old an order was entered in the County Court on the application of defendant which required Plaintiff to thereafter pay \$5.00 per week toward Olga's support.

While he was in the army he did not directly pay the \$5.00 per week required by the Circuit Court, but in lieu thereof Mrs. Jacobs received an allotment from the government of \$23.00 per month. After getting out of the army he sent or gave to Olga two \$10.00 checks, one or two dresses, a night gown, a house coat and a pair of slippers. After getting out of the army and prior to the time he was cited for contempt he paid nothing to Mrs. Jacobs toward the support of Olga, but at the time the petition for citation was filed he was \$122.00 in arrears. After he filed his counter-claim and at the commencement of the hearing herein, he paid such \$122.00 plus \$15.00 which had also accrued.

It is argued by plaintiff that the record shows that in the divorce proceeding the defendant was adjudicated guilty of wilful desertion of her husband, the inference being that this should be considered in disposing of the question of the custody of Olga. Technically defendant was so adjudicated guilty of desertion, but the record also shows the following: His complaint was filed July 11, 1941. On July 31, 1941, she filed an answer denying she was guilty of desertion and a counter-claim for divorce charging him with desertion. In his complaint he did not ask that he be given the custody of Olga, but alleged that Olga was "for some time past in the custody of Mrs. Cloyd Jacobs," the maternal grandmother, and asked that the court "make a just and equitable order" as to the custody of Olga. In her cross-complaint defendant asked that she be given the custody of Olga. In the divorce proceeding, and in the later hearing as to the custody of Olga, defendant was represented by counsel other than the counsel who represented her on this appeal. The record of the divorce

while he was in the army he did not directly pay the \$5.00 per
 week required by the Circuit Court, but in lieu thereof Mrs.
 Jacobs received an allotment from the government of \$25.00 per
 month. After getting out of the army he went or gave to Olga two
 \$10.00 checks, one or two dresses, a night gown, a house coat
 and a pair of slippers. After getting out of the army and prior
 to the time he was cited for contempt he paid nothing to Mrs.
 Jacobs toward the support of Olga, but at the time the petition
 for citation was filed he was \$125.00 in arrears. After he
 filed his counter-claim and at the commencement of the hearing
 herein, he paid each \$125.00 plus \$15.00 which had also accrued.
 It is argued by plaintiff that the record shows that in the
 divorce proceedings the defendant was adjudicated guilty of willful
 desertion of her husband, the inference being that this should be
 considered in disposing of the custody of the custody of Olga.
 Technically defendant was so adjudicated guilty of desertion, but
 the record also shows the following: His complaint was filed
 July 11, 1941. On July 21, 1941, she filed an answer denying she
 was guilty of desertion and a counter-claim for divorce charging
 his with desertion. In his complaint he did not ask that he be
 given the custody of Olga, but alleged that Olga was "for some
 time past in the custody of Mrs. Olga Jacobs," the maternal
 grandmother, and asked that the court "make a just and equitable
 order" as to the custody of Olga. In her cross-complaint defendant
 asked that she be given the custody of Olga. In the divorce
 proceedings, and in the later hearing as to the custody of Olga,
 defendant was represented by counsel other than the counsel who
 represented her on this appeal. The record of the divorce

proceeding shows that when the cause came on for trial neither the defendant nor her attorney was present, but that the attorney for plaintiff asked the court if it was all right to show defendant's attorney as being present and the court said "Yes." Thereupon the court said, "I understand that the attorney for defendant withdraws the counter-claim?" The attorney for plaintiff then stated, "That's right." Thereupon plaintiff testified that about October, 1936, he got a job as a truck driver between Kansas City, Chicago and New York and then asked defendant to go to Kansas City or Chicago to live with him and she refused, she saying she would live with her mother. He then testified that it was agreeable to him and defendant that the maternal grandmother have the custody of Olga. (On such hearing he said nothing about his wanting the custody of Olga or his having no facilities for taking care of her.) He further testified in the divorce proceeding that after he separated from his wife he paid "quite a bit" and then stopped paying "quite a bit," and defendant had him arrested "in the County Court" and he "there agreed to pay her (defendant) \$5.00 a week," and that such order of the County Court was still in effect at the time of the divorce proceeding and he had complied with it. Thereupon on March 4, 1942, he was given a divorce solely on the ground of desertion. The decree ordered that he pay the defendant's costs.

From such record in the divorce proceeding, particularly the procedure therein, the fact that plaintiff's complaint and defendant's cross-complaint both charged and he testified to desertion in October, 1936, the fact that Olga was not born until September, 1937, the fact that the custody of Olga was given to Mrs. Jacobs by mutual

proceeding from that when the cause came on for trial neither the defendant nor her attorney was present, but that the attorney for plaintiff asked the court if it was all right to proceed in the absence of the defendant and the court said "Yes". Thereupon the court said, "I understand that the attorney for defendant withdrew the counter-claim". The attorney for plaintiff then stated, "That's right." Thereupon plaintiff testified that about October 1936, he got a job as a truck driver between Kansas City, Missouri and New York and then asked defendant to go to Kansas City to live with him and she refused, she saying she would live with her mother. He then testified that it was impossible to him and defendant that the maternal grandparents have the custody of Olive. (On each hearing he said nothing about his residing in custody of Olive or his having no facilities for taking care of her.) He further testified in the divorce proceeding that after he separated from his wife he said "quite a bit" and then stopped saying "quite a bit", and defendant had his apartment "in the County Court" and he "didn't want to say his (defendant) was in a week", and that such order of the County Court was still in effect at the time of the divorce proceeding and he had no communication with it. Thereupon on March 6, 1942, he was given a divorce solely on the ground of desertion. The decree ordered that he pay the defendant's costs.

From such record in the divorce proceeding, particularly the procedure therein, the fact that plaintiff's complaint and defendant's cross-complaint both charged and he testified to desertion in October, 1938, the fact that she was not born until November, 1927, the fact that the custody of Olive was given to her father by mutual

agreement, the fact that the costs were taxed against the plaintiff apparently on his own motion, and from other significant foregoing dates, we believe it is obvious that it was apparently agreeable to both plaintiff and defendant that under the facts then existing the particular divorce decree be entered as entered. At any rate, under the particular facts of this case, we do not believe that the fact that the defendant was the one adjudicated guilty of desertion is worthy of much consideration.

It is argued by plaintiff that the record fails to disclose that Mrs. Jacobs, the maternal grandmother, intervened in this proceeding to ask the court to allow her to retain custody of the child. It is true that Mrs. Jacobs was never made a formal party to this proceeding and filed no petition herein. However, she did appear as a witness for defendant in the hearing on June 3, 1946. She then testified, among other things, that Olga had been living with her every minute of Olga's life, that she loved Olga, that "we all" contribute to the support of Olga, that defendant buys most of Olga's clothes, and that "of all things I want to do in my life I want to keep the baby. She is part of me." We do not consider as being material the fact that Mrs. Jacobs filed no intervening petition or formal pleading herein.

The paramount consideration in determining to whom the custody of a child shall be awarded after a divorce is the welfare and best interests of the child. (27 C.J.S. ^{page} 1170; Buehler v. Buehler, 373 Ill. 626, 630.) A decree fixing the custody of a child is final on the conditions then existing and should not be changed afterwards unless on altered conditions since the decree, or on material facts existing at the time of the decree but unknown

...of which...

[illegible][illegible]

to the court, and then only for the welfare of the child. (Thomas v. Thomas, 233 Ill.App. 488, 493; 27 C.J.S. p. 1188.) While a very large discretion is permitted the chancellor hearing such a case, yet it is a judicial discretion and subject to review.

We have given very careful consideration to all of the evidence. The facts speak for themselves and ^{detached} comment is not necessary. We are of the opinion that the decree appealed from is clearly against the manifest weight of the evidence, in that no good cause was shown why the decree of divorce which gave the custody of Olga to her grandmother should have been modified so as to give the plaintiff custody, and it was not shown that it was for the best interests of Olga that her custody be transferred from the grandmother to the father. The trial court therefore erred in entering the decree appealed from.

The decree of the trial court entered on June 3, 1946, is therefore reversed and the cause is remanded to the trial court with directions to the trial court to dismiss at the costs of the plaintiff the counter-claim of the plaintiff filed on May 11, 1946.

Reversed and remanded with directions.



[illegible]

You are responsible for the return of this book.

[illegible]

